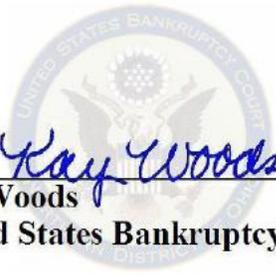


IT IS SO ORDERED.

Dated: October 12, 2016
08:53:46 AM


Kay Woods

Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

MARK A. SOOS and
MARLENE K. SOOS,

Debtors.

* * * * *

RICHARD G. ZELLERS,

Plaintiff,

v.

SCHRAEDER AND ASSOCIATES, et
al.,

Defendants.

CASE NUMBER 14-40280

ADVERSARY NUMBER 16-04018

HONORABLE KAY WOODS

MEMORANDUM OPINION REGARDING MOTION FOR SUMMARY JUDGMENT

This cause is before the Court on Motion for Summary Judgment
(Doc. 20) filed by Plaintiff Richard G. Zellers, Chapter 7 Trustee

("Trustee"), on August 29, 2016. The Trustee requests this Court (i) to order that Defendant Shrader and Associates¹ turn over \$150,000.00 in settlement funds held in its IOLTA account ("Settlement Funds"); and (ii) to set a deadline by which the Defendant must file a formal application for fees and expenses in connection with its work as special counsel in a separate matter. The Defendant is represented in this proceeding by John R. Crilly, Esq. The Defendant did not respond to the Motion for Summary Judgment.

For the reasons set forth herein, the Court will grant the Motion for Summary Judgment.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and General Order No. 2012-7 entered in this district pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408, and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(E). The following constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

I. STATEMENT OF FACTS

The pleadings and documents filed in the underlying bankruptcy case and in this adversary proceeding establish the undisputed material facts set forth below.

¹ The Trustee's Complaint misspells the Defendant firm's name as "Schraeder and Associates." (Doc. 1.) The correct spelling, "Shrader and Associates," is used herein.

A. Bankruptcy Case

Debtors Mark A. Soos and Marlene K. Soos, by and through Eric J. Ashman, Esq., filed a voluntary chapter 7 petition on February 20, 2014, which was denominated Case No. 14-40280 ("Main Case"). At the time of filing of the bankruptcy, the Debtors had a cause of action against various defendants in a benzene lawsuit ("Benzene Lawsuit"). In Schedule B - Personal Property, the Debtors listed "Benzine [sic] Lawsuit Represented by David Bullock [sic] (Schrader & Associates)" as a pre-petition claim of unknown value. (Main Case, Doc. 1 at 12.)

On August 13, 2014, the Trustee filed an application to employ David Baluk, Esq. of Shrader and Associates as special counsel (Main Case, Doc. 30) in the Benzene Lawsuit. On August 27, 2014, this Court issued Order of Appointment ("Order") (Main Case, Doc. 31), which appointed David Baluk, Esq. as special counsel in the Benzene Lawsuit and further ordered that "[s]ubject to an application, the Court will determine the amount of fees or compensation to be paid to the Attorney." (Order at 1-2.) The Benzene Lawsuit was later settled and the Settlement Funds were disbursed to the Defendant.

B. Adversary Proceeding

On March 22, 2016, the Trustee filed Complaint for Turnover (Doc. 1), which commenced this adversary proceeding, seeking

turnover of the Settlement Funds and requesting that the Defendant submit detail for its fees and expenses.

On April 21, 2016, the Defendant filed Answer to Complaint for Turnover ("Answer") (Doc. 5), in which it admits that the Benzene Lawsuit was settled for the total amount of \$150,000.00, which is currently held in the Defendant's IOLTA account. (Ans. ¶ 8.) The Defendant also asserts that it is not an adversary to the interests of the bankruptcy estate and bases its refusal to turn over the Settlement Funds, in part, on the premise that the Trustee has not provided adequate assurances that the Defendant will be paid its legal fees and expenses. (*Id.* ¶¶ 9-10.)

On August 22, 2016, the Court held a telephonic status conference in relation to this proceeding, at which the Court granted the Trustee's oral motion for leave to file the Motion for Summary Judgment. The Defendant failed to participate in the telephonic status conference.

On August 29, 2016, the Trustee filed his Motion for Summary Judgment. In lieu of a stipulation of facts, the Trustee attached Affidavit of Keith Patton ("Affidavit") to his Motion for Summary Judgment as Exhibit A. Mr. Patton is employed as an attorney by the Defendant and was involved in negotiating settlement of the Benzene Lawsuit. (Aff. at 1.) In his Affidavit, Attorney Patton attests that the Benzene Lawsuit was "fully resolved for a total

amount of \$150,000.00 [and] [a]ll funds are currently held in [his] firm's IOLTA account." (*Id.*)

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 56(a), made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7056, states, in pertinent part:

The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.

FED. R. CIV. P. 56(a) (2016). Material facts are those "that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue of material fact exists "if a reasonable person could return a verdict for the non-moving party." *Jacob v. Twp. of W. Bloomfield.*, 531 F.3d 385, 389 (6th Cir. 2008) (citing *Anderson*, 477 U.S. at 248).

"The moving party bears the burden of proving the absence of genuine issues of material fact and its entitlement to judgment as a matter of law." *Longaberger Co. v. Kolt*, 586 F.3d 459, 465 (6th Cir. 2009) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)). The burden then shifts to the nonmoving party to present specific facts demonstrating the existence of a genuine dispute. *Pucci v. Nineteenth Dist. Court*, 628 F.3d 752, 759-60 (6th Cir. 2010) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,

475 U.S. 574, 587 (1986)). In evaluating a motion for summary judgment, "the court must view the factual evidence and draw all reasonable inferences in favor of the nonmoving party." *Banks v. Wolfe County Bd. of Educ.*, 330 F.3d 888, 892 (6th Cir. 2003) (citing *Matsushita*, 475 U.S. at 587).

III. LAW & ANALYSIS

Based on all of the evidence before the Court, there is no genuine dispute as to issues of material fact, *i.e.*, there is no genuine dispute that the Defendant holds property that belongs to the bankruptcy estate.

It is undisputed that the Benzene Lawsuit is a listed pre-petition asset of the bankruptcy estate and that the Defendant holds the \$150,000.00 Settlement Funds in its IOLTA account as proceeds from the settlement of that claim.² 11 U.S.C. § 542 provides, in pertinent part:

[A]n 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 . . . 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.

² The Defendant admits that "[a]t the time of filing of the bankruptcy, the Debtors had a cause of action against various defendants in a benzene lawsuit claim, which was in fact listed as an asset in Debtors' schedules with an unknown value." (Compl. ¶ 4; Ans. ¶ 4.) The Defendant also admits that "[a] settlement has been reached . . . for the total amount of \$150,000, which is being held in the Schraeder Iolta [sic] account." (Compl. ¶ 8; Ans. ¶ 8.)

11 U.S.C. § 542(a) (2016). 11 U.S.C. § 363 provides, in pertinent part, that “[t]he trustee, after notice and a hearing, may use, sell, or lease . . . property of the estate.” 11 U.S.C. § 363(b)(1) (2016). Property of the estate includes, among other things, “all legal or equitable interests of the debtor in property as of the commencement of the case.” 11 U.S.C. § 541(a)(1) (2016). As property of the estate, the Settlement Funds are property that the Trustee may use, sell, or lease, and therefore the Defendant is required to turn over the Settlement Funds to the Trustee pursuant to § 542.

The Defendant has asserted no legal basis for its refusal to turn over the Settlement Funds. The Defendant did not respond to the Trustee’s Motion for Summary Judgment and does not dispute the Trustee’s interest in the Settlement Funds. In its Answer, the Defendant vaguely explains that its basis for refusing to turn over the Settlement Funds is that the Defendant has not been paid legal fees or expenses. (Ans. ¶¶ 9-10.) The Order appointing special counsel, however, is clear from the outset that the Defendant’s legal fees and expenses are to be paid only on application to and approval of this Court. (Order at 1-2.)

The Trustee has met his burden to establish the absence of a genuine issue of material fact in this matter. The Defendant offers no response or legal basis for challenging the Trustee’s Motion for Summary Judgment. Accordingly, the Trustee is entitled

to judgment as a matter of law and summary judgment is proper in this adversary proceeding. The Court will grant the Motion for Summary Judgment.

IV. CONCLUSION

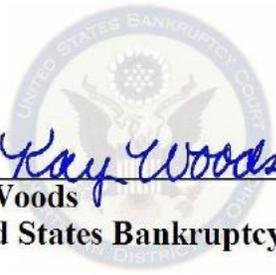
Based on all of the evidence before the Court, there are no genuine issues of material fact. Viewing the facts in the light most favorable to the Defendant, the Trustee has established that the Defendant holds the \$150,000.00 Settlement Funds from Debtors' pre-petition Benzene Lawsuit claim, which is property of the bankruptcy estate. The Defendant may be entitled to fees and expenses only upon application to and approval from this Court.

An appropriate order will follow.

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IT IS SO ORDERED.

Dated: October 12, 2016
09:03:45 AM


Kay Woods

Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

MARK A. SOOS and
MARLENE K. SOOS,

Debtors.

* * * * *

RICHARD G. ZELLERS,

Plaintiff,

v.

SCHRAEDER AND ASSOCIATES, et
al.,

Defendants.

CASE NUMBER 14-40280

ADVERSARY NUMBER 16-04018

HONORABLE KAY WOODS

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

For the reasons set forth in this Court's Memorandum Opinion
Regarding Motion for Summary Judgment entered on this date, the
Court hereby:

1. Grants the Trustee's Motion for Summary Judgment;
2. Orders the Defendant to turn over \$150,000.00 to the Trustee within fourteen (14) days after entry of this Order;
3. Orders the Defendant to file and serve an application for attorney fees and expenses within fourteen (14) days after entry of this Order; and
4. Permits the Trustee fourteen (14) days thereafter to respond to the Defendant's fee application.

IT IS SO ORDERED.

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