UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	CHAPTER 7
	)	
JEFFREY TOBIN and	)	CASE NO. 01-61721
CAROLYN TOBIN,	)	
	)	JUDGE RUSS KENDIG
Debtors.	)	
JEFFREY TOBIN and	)	ADV. NO. 02-6047
CAROLYN TOBIN,	)	
	)	
Plaintiffs,	)	
	)	**MEMORANDUM OF DECISION**
v.	)	
	)	
JOSIAH MASON, et al.,	)	
	)	
Defendants.	)	

This matter is before the court on the cross motions for summary judgment[1] of plaintiffs Jeffrey and Carolyn Tobin (hereafter "Plaintiffs") and trustee Josiah L. Mason (hereafter "Trustee").

The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(a) and the general order of reference entered in this district on July 16, 1984. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (B). The following constitutes the court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

FACTS AND ARGUMENTS

Plaintiffs filed bankruptcy on April 25, 2001.[2] Subsequently, Trustee conducted an examination of Plaintiffs under Federal Rule of Bankruptcy Procedure 2004. Trustee discovered that Plaintiff Carolyn Tobin had a potential product liability claim resulting from a prepetition

[1]Tobins' counsel captioned their pleading "memorandum of plaintiffs." The court will treat this pleading as a motion for summary judgment.

[2]Plaintiffs were initially represented by Charles T. Robinson. Current counsel Donald E. George entered a notice of appearance on July 17, 2001.

workplace injury.[3] Plaintiffs had retained John Rinehardt (hereafter "Rinehardt") to pursue this claim but had since discharged him. Subsequently, Trustee retained Rinehardt to pursue the product liability claim for the estate.[4]

Plaintiffs commenced this adversary proceeding against Trustee and Rinehardt for declaratory judgment and injunctive relief. Plaintiffs made two arguments. First, Plaintiffs argued that the portion of the product liability claim that relates to postpetition damages is not property of the estate. Second, Plaintiffs argued that Rinehardt cannot represent Trustee without creating a conflict of interest.

Trustee and Rinehardt countered that being Plaintiffs' previous counsel, Rinehardt is in the best position to represent Trustee on the product liability claim and no conflict of interest exists. Trustee also argued that the product liability claim is property of the estate.

The court held two pretrial conferences to discuss this matter. Subsequently, an order was entered allowing Rinehardt to proceed as special counsel to Trustee in order to file the product liability complaint before the statute of limitations ran and allowing the parties to file motions for summary judgment.

In their motion for summary judgment, Plaintiffs contend that their rights under the Equal Protection Clause are being violated because they are being treated differently than those debtors who are entitled to retain postpetition assets.[5] Plaintiffs argue that no rational basis exists for distinguishing between those debtors who are entitled to retain postpetition assets and those who are not.

In his motion for summary judgment, Trustee argues that the right to proceeds from a product liability action that arose prepetition are property of the estate. Any proceeds which Plaintiffs can retain are pursuant to state exemption laws. Trustee also argues that no conflict

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[3]This claim had not been disclosed in Plaintiffs' schedules. To date, Plaintiffs have not amended their schedules to correct this omission nor have Plaintiffs scheduled any corresponding exemptions for this claim. Plaintiffs' complaint states that the injury occurred in July 2000, which is prior to the date of the petition.

[4]Trustee failed to serve a copy of both the motion and order appointing Rinehardt as his counsel on either Plaintiffs or their counsel, failed to note whether retention was as general counsel under 11 U.S.C. § 327(a) or special counsel under 11 U.S.C. § 327(e), and failed to adequately disclose Rinehardt's prior representation of the Plaintiffs. These omissions were corrected in the order entered August 5, 2002.

[5]Plaintiffs fail to address the argument they previously raised that Trustee's retention of Rinehardt as special counsel creates a conflict of interest because of his prior representation of Plaintiffs.

of interest exists if Rinehardt represents Trustee, having previously represented Plaintiffs, where Rinehardt has no interest that is adverse to the estate.

ANALYSIS

I. Standard of Review

The procedure for granting summary judgment is found in Federal Rule of Civil Procedure 56(c), made applicable to this proceeding through Federal Rule of Bankruptcy Procedure 7056, which provides in part

> [t]he 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 a judgment as a matter of law.

Federal Rule of Civil Procedure 56(c).

The evidence must be viewed in the light most favorable to the nonmoving party. Adickes v. S.H.Kress & Co., 398 U.S. 144, 158-59 (1970). Summary judgment is not appropriate if a material dispute exists over the facts, "that is, if evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Summary judgment is appropriate, however, if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). *See also* Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986).

The Sixth Circuit Court of Appeals has recognized that Liberty Lobby, Celotex, and Matsushita effected "a decided change in summary judgment practice," ushering in a "new era" in summary judgments. Street v. J.C. Bradford & Co., 886 F.2d 1472, 1476 (6th Cir. 1989). In responding to a proper motion for summary judgment, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" Street, 886 F.2d at 1479 (quoting Liberty Lobby, 477 U.S. at 257). The nonmoving party must introduce more than a scintilla of evidence to overcome the summary judgment motion. Street, 886 F.2d at 1479. It is also not sufficient for the nonmoving party merely to "show that there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586. Moreover, "[t]he trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of material fact." Street, 886 F.2d at 1479. That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact.

This line of cases emphasizes the point that when one party moves for summary judgment, the nonmoving party must take affirmative steps to rebut the application of summary judgment. Courts have stated that:

> Under *Liberty Lobby* and *Celotex*, a party may move for summary judgment asserting that the opposing party will not be able to produce sufficient evidence at trial to withstand a directed verdict, and if the opposing party is thereafter unable to demonstrate that he can do so, summary judgment is appropriate. "In other words, the movant could challenge the opposing party to 'put up or shut up' on a critical issue [and] . . . if the respondent did not 'put up,' summary judgment was proper."

Fulson v. City of Columbus, 801 F. Supp. 1, 4 (S.D. Ohio 1992) (citations omitted) (quoting Street, 886 F.2d at 1478).

II. Property of the estate

Section 541 of the Bankruptcy Code defines property of the estate as:

> (a) The commencement of a case . . . creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
>
> (1) . . . all legal or equitable interests of the debtor, in property as of the commencement of the case.

11 U.S.C. § 541(a)(1). According to the legislative history, the purpose of § 541(a) is to "bring anything of value that the debtors have into the estate." H.R. Rep. No. 95-595, at 176 (1977). Section 541(a) should be construed broadly in determining what constitutes property of the estate. U.S. v. Whiting Pools, Inc., 462 U.S. 198, 205-06 (1983). This broad construction of § 541(a) includes capturing those causes of action existing at the time the bankruptcy action is commenced. Whiting Pools, 462 U.S. at 205 & n. 9; In re Carson, 82 B.R. 847, 851 (Bankr S.D. Ohio 1987); In re Bell & Beckwith, 50 B.R. 422, 433 (Bankr. N.D. Ohio 1985). Plaintiffs' product liability cause of action existed at the time they filed their bankruptcy, so clearly, this cause of action is property of the estate. However, property of the estate may be retained by a debtor pursuant to the election of an appropriate exemption. *See generally* 11 U.S.C. § 522 and O.R.C. § 2329.66.

Upon the filing of their bankruptcy petition, Plaintiffs were required to file schedules listing all their assets and liabilities. 11 U.S.C. § 521(1). They were to declare their personal property assets in schedule B and elect their exemptions in schedule C. Fed. R. of Bankr. P.

1007(b)(1) and 11 U.S.C. § 522. Plaintiffs failed to do this, and to date, plaintiffs have failed to file amendments. It was only due to Trustee's persistence that Plaintiffs' product liability claim was discovered.

Plaintiffs argue that they should be entitled to retain a portion of the product liability claim as a postpetition asset that is not property of the estate. They are putting the cart before the horse. This matter is not properly before the court as the product liability claim, including its potential value and any corresponding exemptions, have not been scheduled by Plaintiffs. Unless or until Plaintiffs amend their schedules, this matter is not ripe for review. Upon an amendment by Plaintiffs, Trustee may object to the amendment or object to or seek limitation of the claimed exemption.[6] Until an amendment is made, the court cannot properly determine what is or is not property of the estate and is or is not exemptible. In the meantime, it is clear that the cause of action is property of the estate, and Trustee is entitled to pursue the asset on behalf of the estate. *See* In re Thomas, 236 B.R. 573 (Bankr. E.D. N.Y. 1999) (when cause of action is property of the estate, debtor has no standing to pursue); Davis v. AVCO Finance (In re Davis), 158 B.R. 1000 (Bankr. N.D. Ind. 1993) (when cause of action is property of the estate, trustee is real party in interest).

III. Conflict of interest

A. 11 U.S.C. § 327(e)

The general authority for a trustee to retain counsel is located in section 327(a), which provides in pertinent part:

> (a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

11 U.S.C. § 327(a). This provision is modified for the retention of special counsel in § 327(e):

> The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor,

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[6] *See* Lucius v. McLemore, 741 F.2d 125, 127 (6th Cir. 1984) ("Courts may . . . refuse to allow an amendment where the debtor has acted in bad faith or where property has been concealed."); Matter of Doan, 672 F.2d 831, 833 (11th Cir. 1982) ("[C]oncealment of an asset will bar exemption of that asset.").

> if in the best interest of the estate, *and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed*.

11 U.S.C. § 327(e) (emphasis added). The oft-cited definition of adverse interest is:

> (1) to possess . . . an economic interest that would tend to lessen the value of the bankruptcy estate or that would create either an actual or potential dispute in which the estate is a rival claimant; or (2) to possess a predisposition under circumstances that render such a bias against the estate.

In re Fretter, 219 B.R. 769, 777 (Bankr N.D. Ohio 1998) (quoting In Re Roberts, 46 B.R. 815, 827 (Bankr. D. Utah 1985), *rev'd in part on other grounds*, 75 B.R. 402 (D. Utah 1987)). Thus, subsection (e) of § 327 eliminates the disinterestedness requirement and narrows the conflict of interest inquiry to an actual or potential economic interest or predisposition against the estate.

Trustee has retained Rinehardt as special counsel to Trustee under § 327(e). Therefore, no disinterestedness inquiry need be undertaken. The court need only determine whether Rinehardt, as Plaintiffs' previous counsel, holds an actual or potential interest against the estate. Rinehardt does not have an economic interest adverse to the estate. Rinehardt asserts, in the affidavit attached to Trustee's motion for summary judgment, that after Plaintiffs discharged him Rinehardt did not seek reimbursement for expenses advanced or professional services rendered. Therefore, Rinehardt does not have a claim as Plaintiffs' creditor for which he seeks reimbursement from the estate. Rinehardt is now representing Trustee in the very same action in which he represented Plaintiffs. Plaintiffs argue that Rinehardt holds a bias against them. The estate and Plaintiffs have the same economic interest in mind, as high a financial recovery as possible. The bias in favor of the estate works in Plaintiffs' favor. This bias is permissible under § 327(e), and therefore, no conflict exists.

B. Canon 4 of the Code of Professional Responsibility

The court has established that Rinehardt's retention does not create a conflict under 11 U.S.C. § 327(e), however, the inquiry does not end there. There is also the potential that Rinehardt's representation of Trustee violates the Ohio Code of Professional Responsibility applicable to bankruptcy cases through Rule 2090-2 of the Local Rules for the United States Bankruptcy Court for the Northern District of Ohio and its incorporation of Rule 83.7 of the Local Rules for the United States District Court for the Northern District of Ohio.[7] Canon 4, A

[7]"Attorneys who practice before a bankruptcy court must not only concern themselves with the obligations set forth in the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure, but also with the application of state ethical rules." In re Soulisak,

Lawyer Should Preserve the Confidences and Secrets of a Client,[8] is applicable. This Canon "promotes the sound policy of confidentiality of communication inherent in the attorney-client relationship by insuring, in the first instance, fundamental fairness in the judicial process by shielding the client from the attorney's use of confidential information against him." City of Cleveland v. The Cleveland Electric Illuminating Co., 440 F.Supp. 193, 206 (N.D. Ohio 1977).

In order to determine whether a conflict of interest requires disqualification, the Sixth Circuit Court of Appeals has adopted a three-pronged test. Dana Corp. v. Blue Cross & Blue Shield Mutual of Northern Ohio, 900 F.2d 882, 889 (6th Cir. 1990) (citing City of Cleveland v. Cleveland Electric Illuminating, 440 F.Supp. 193, 207 (N.D. Ohio 1976), *aff'd*, 573 F.2d 1310 (6th Cir. 1977)). The moving party must prove that: 1. a past attorney-client relationship exists; 2. the subject matter of the past relationship and the present relationship is substantially related; and 3. the attorney acquired confidential information during the past relationship. Dana Corp., 900 F.2d at 889.

The ability to disqualify an opposing party's attorney should not be taken lightly. This is a tactic often used to thwart an opposing party's case. For that reason, courts are sensitive to balancing the need to preserve client confidences with the desire to permit a party to retain the counsel of his or her own choosing. Manning v. Waring, Cox, James, Sklar, and Allen, 849 F.2d

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227 B.R. 77, 80 (Bankr. E.D. Va. 1998).

[8]The applicable disciplinary rule, DR 4-101, provides in pertinent part:

DR 4-101 Preservation of Confidences and Secrets of a Client.

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

Code of Prof'l Responsibility Canon 4.

222, 224 (6th Cir. 1988). The burden of proof is on the party seeking disqualification. In re Mount Vernon Plaza Community Urban Redevelopment Corp., 85 B.R. 762, 765 (Bankr. S.D. Ohio 1988).

Applying the test to the case at hand, Plaintiffs have met their burden on the first two prongs. A past relationship between Rinehardt and them exists and the subject matter of their past relationship and Rinehardt's present relationship with Trustee is substantially similar. However, Plaintiffs have not met their burden as to whether Rinehardt possesses confidential information from that relationship that could be used to the advantage of the estate and to Plaintiffs' detriment, or if Rinehardt possesses confidential information, whether he has committed a breach of confidentiality. If you have not done anything evil, you should not have to worry about the devil knocking at your door. Therefore, Plaintiffs' request to disqualify Rinehardt is not well taken.

Plaintiffs' claim is not adversarial to Rinehardt's representation of the estate. As stated previously, both Plaintiffs and Rinehardt are working toward the same goal; recovery of as much money as possible on their product liability claim. Where the estate's interest may differ from theirs could be in the allowance of exemptions or settlement versus continued litigation of their product liability claim. As to those matters, Plaintiffs can respond to an objection to their exemptions[9] or object to a settlement of their claim by Trustee. Safeguards exist in this process to protect Plaintiffs without resort to disqualification of Trustee's counsel for a phantom conflict of interest.

CONCLUSION

Plaintiffs and Trustee filed cross motions for summary judgment requesting the court determine whether postpetition damages arising from a prepetition claim are property of the estate and whether Trustee's retention of special counsel, Rinehardt, creates a conflict of interest.

For the foregoing reasons, the court finds that Plaintiffs have failed to meet their burden as to these two issues. Accordingly, the court finds Plaintiffs' claim to be property of the estate under 11 U.S.C. § 541, and Trustee's retention of Rinehardt as special counsel not to create a conflict of interest under 11 U.S.C. § 327(e) or Canon 4 of the Code of Professional Responsibility.

An order consistent with this memorandum of decision shall enter forthwith.

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RUSS KENDIG
U.S. BANKRUPTCY JUDGE

[9]For the reasons discussed previously, such a dispute over exemptions is not ripe.

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this Memorandum of Decision and accompanying Order was mailed, via regular United States Mail, to the following on the _____day of December 2002.

Donald E. George
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Josiah L. Mason
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John K. Rinehardt
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Mansfield, Ohio 44906

_____
Deputy Clerk

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NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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Debtors.	)	
JEFFREY TOBIN and	)	ADV. NO. 02-6047
CAROLYN TOBIN,	)	
	)	
Plaintiffs,	)	
	)	**ORDER**
v.	)	
	)	
JOSIAH MASON, et al.,	)	
	)	
Defendants.	)	

This matter came before the court on the cross motions for summary judgment filed by Plaintiffs and Trustee. For the reasons stated in the Memorandum of Decision, Plaintiffs' motion for summary judgment is **DENIED**, and Trustee's motion for summary judgment is **GRANTED**. Plaintiffs' complaint for declaratory and injunctive relief is hereby **DISMISSED**.

It is so ordered.

RUSS KENDIG
U.S. BANKRUPTCY JUDGE