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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
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U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

In re:)	Case No. 99-17499
)	
TRIANGLE DEVELOPMENT, INC.,)	Chapter 7
)	
Debtor.)	Judge Pat E. Morgenstern-Clarren
_____)	
)	
LAUREN A. HELBLING, TRUSTEE,)	Adversary Proceeding No. 03-1540
)	
Plaintiff,)	
)	
v.)	
)	
JOAN KODISH,)	<u>MEMORANDUM OF OPINION</u>
)	
Defendant.)	

Attorney Joan Kodish represented Triangle Development, Inc. when it filed its chapter 11 case. In a series of orders, this court found that Ms. Kodish must disgorge a \$10,000.00 retainer that she received in connection with the case because she violated numerous bankruptcy code sections and rules. The Triangle case was later converted to chapter 7 and the chapter 7 trustee filed this complaint against Ms. Kodish seeking a determination that the \$10,000.00 is an asset of the Triangle chapter 7 estate. Ms. Kodish denies that. She does not claim that she has an interest in the money, but instead asserts that the money belongs to a third party not named in the complaint. Both the plaintiff and defendant move for summary judgment and both oppose the competing motion. As discussed below, the motions for summary judgment are denied because the parties have not provided sufficient facts to resolve the legal issue and additional parties must

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be joined to resolve the matter. (Docket 36, 37).

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2).

FACTS

These facts come from the court record:

Triangle Development, Inc. filed a chapter 11 petition on September 28, 1999. Ms. Kodish received a \$10,000.00 retainer to represent the debtor. Ms. Kodish eventually admitted that, contrary to the bankruptcy code and rules, she commingled the retainer with her personal and business funds and spent the money without filing a fee application and without court permission.

To try to remedy this, Ms. Kodish belatedly filed a fee application. The United States trustee objected to the application and requested disgorgement of all fees because Ms. Kodish (1) failed to hold her prepetition retainer in a client trust account; and (2) represented insiders during the case without making full disclosure.¹ Ms. Kodish attempted to moot this issue by filing a notice that she was withdrawing her fee application and yet intended to keep the retainer. The court treated her notice as a motion and granted her conditional leave to withdraw the application. The conditions of withdrawal required: (1) Ms. Kodish to deposit \$10,000.00 into

¹ See case no.99-17499, docket 129. The United States Trustee also moved to review Ms. Kodish's retention, remove her as counsel, and deny any fees because (in addition to the other problems) she failed to disclose a connection to the debtor that allegedly would have disqualified her from being appointed counsel in the first place. Case no. 99-17499, docket 109, 120.

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the court pending a hearing to determine whether the funds should go to the debtor or to some third party; (2) that Ms. Kodish not seek or accept any payment of fees for her services in the Triangle case; and (3) that the application for fees be dismissed with prejudice.² Ms. Kodish did not object to these conditions and they became final, requiring her to deposit the funds into court.³

When Ms. Kodish failed to deposit the funds, the court held her in contempt, after notice and a hearing.⁴ Before imposing sanctions, the court gave Ms. Kodish a final opportunity to either pay the funds or propose a payment plan. The court then ordered into effect the payment plan which she herself proposed.⁵ Once again, Ms. Kodish failed to meet her obligations.

On January 31, 2003, Ms. Kodish filed her personal bankruptcy case in Akron.⁶ The Triangle chapter 7 trustee filed an adversary proceeding in the Akron case to determine whether Ms. Kodish's obligation to disgorge the retainer is a dischargeable debt.⁷ The issue they now present to this court is whether the retainer is property of the Triangle chapter 7 estate.

The chapter 7 trustee and Ms. Kodish request that the court resolve this issue on cross-motions for summary judgment. They have stipulated to these additional facts:

² Case no. 99-17499, docket 192, 193, 195.

³ Case no. 99-17499, docket 195.

⁴ Case no. 99-17499, docket 216, 217.

⁵ Case no. 99-17499, docket 192, 193, 226, 227.

⁶ Case no. 03-50480.

⁷ Adv. No. 03-5122. The Hon. Marilyn Shea-Stonum abated that proceeding so that the parties could bring the property issue before this court.

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- [1]. Joan Kodish received a \$10,000 retainer from . . . A&A Paving, Inc. and/or Alfred Edwards for her legal services rendered relative to filing the Triangle case.
- [2]. The \$10,000 was received by Joan Kodish prior to the time the petition was filed.
- [3]. The source of the \$10,000 retainer was an entity other than Triangle.
- [4]. Joan Kodish has been ordered to disgorge the \$10,000 fee. Joan Kodish has paid a total of \$1,000 to the clerk.

Docket 35.

DISCUSSION

I. The positions of the parties

The trustee's complaint requests a determination that the \$1,000.00 on deposit with the court and the remaining \$9,000.00 which Ms. Kodish is required to pay into court is property of the chapter 7 estate as defined by 11 U.S.C. § 541. The trustee argues that the payment of the retainer by Alfred Edwards or A&A Paving was either a gift or a loan to Triangle. Under either scenario, she contends that Triangle had a legal or an equitable interest in the retainer at filing and, therefore, that Ms. Kodish's obligation to repay the funds is property of the estate. She requests summary judgment to that effect. Ms. Kodish opposes summary judgment and argues that the trustee has not met her burden of establishing that the retainer was either a loan or a gift to Triangle. She also argues that the trustee is attempting to pursue the claims of the third party that paid the retainer and lacks standing to do so. Ms. Kodish requests summary judgment in her favor.

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A. Standing

Ms. Kodish challenges the trustee's standing to bring this action by arguing that the trustee is actually pursuing this issue on behalf of the creditor who paid the retainer, either A&A Paving or Alfred Edwards. This is inaccurate. The complaint seeks a determination regarding the chapter 7 estate's interest in property (the deposited \$1,000.00 and Ms. Kodish's obligation to repay an additional \$9,000.00). The trustee is trying to recover this property on behalf of the estate and certainly has standing to do so. See *Honigman v. Comerica bank (In re Van Dresser Corp.)*, 128 F.3d 945, 947 (6th Cir. 1997) (noting that a trustee has the exclusive right to assert a debtor's claim to interest in property). See also 11 U.S.C. § 704(1) (requiring a chapter 7 trustee to "reduce to money the property of the estate for which such trustee serves[.]").

Ms. Kodish relies on *Henderson v. Kisseberth (In re Kisseberth)*, 273 F.3d 714 (6th Cir. 2001) to support her position. The reliance is misplaced. In *Kisseberth*, a third party made a postpetition payment to an attorney relating to the chapter 7 case. Because a chapter 7 estate consists of the debtor's assets at the time the case is filed, the payment never became part of the chapter 7 estate. In the present case, the payment was made prepetition and the chapter 11 estate had at least an equitable interest in the retainer which was property of the estate. See *Mapother & Mapother, P.S.C. v. Cooper (In re Downs)*, 103 F.3d 472, 478 (6th Cir. 1996) ("Retainers paid to counsel for the debtor are to be held in trust for the debtor, and the debtor's equitable interest in the trust is property of the estate."). The trustee has standing to try to recover that interest.

B. Summary judgment

Both parties move for summary judgment. Although they both asked the court to resolve this issue in favor of one party or the other on summary judgment, they have argued the legal

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standard for summary judgment rather than submitting the issue for final determination on the stipulated facts. The court must, therefore, apply the summary judgment standard, application of which precludes the court from deciding this issue at this point in the case.

Summary judgment is appropriate only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c), made applicable by FED. R. BANKR. P. 7056; *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Summary judgment may be granted when “the record taken as a whole could not lead a rational trier of fact to find for the non-moving party.” *Northland Ins. Co. v. Guardsman Prods., Inc.*, 141 F.3d 612, 616 (6th Cir. 1998) (citing *Agristor Fin. Corp. v. Van Sickle*, 967 F.2d 233, 236 (6th Cir. 1992)).

This court found in earlier orders that Ms. Kodish does not have any right to keep the \$10,000.00 she received as a retainer. The court now finds that the chapter 7 estate has at least an equitable interest in those funds. The remaining question is whether the funds are the property of the chapter 7 estate or the property of the third party who paid the retainer. The difficulty here is that the stipulations do not provide any facts about the circumstances underlying the third party payment. The trustee argues that it must have been either a gift or a loan. Ms. Kodish does not concede that and the legal standards for establishing that the payment was a gift or a loan are not the same. The court cannot determine the nature of the payment without knowing the facts that led to the transfer. The stipulations do not address this and neither side has supplemented the stipulations with other evidence as permitted by the bankruptcy rules. *See* FED. R. BANKR. P.

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7056. As a result, there is a material issue of fact that prevents entry of summary judgment in favor of either party.

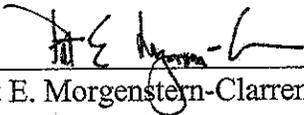
C. Leave to Amend the Complaint

The court cannot determine ownership of the property without having the third party payor(s) before it. Their joinder is, therefore, necessary and appropriate. *See* FED. R. BANKR. P. 7019 (incorporating FED. R. CIV. P. 19(a)). The court grants the trustee leave, *sua sponte*, to join A&A Paving, Inc. and Alfred Edwards as defendants so that this issue may be resolved. *See* 11 U.S.C. § 105(a).

CONCLUSION

For the reasons stated, the trustee's motion for summary judgment is denied and Ms. Kodish's motion for summary judgment is denied. The trustee is given 20 days to file an amended complaint which joins as parties those additional individuals and/or entities which may claim an interest in the property which is the subject of this action. A separate order will be entered reflecting this decision.

Date: 18 June 2005



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

To be served by clerk's office email and the Bankruptcy Noticing Center on:

Lauren Helbling, Esq.
Alexander Jurczenko, Esq.

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TRIANGLE DEVELOPMENT, INC.,) Chapter 7
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Debtor.) Judge Pat E. Morgenstern-Clarren
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_____)
LAUREN A. HELBLING, TRUSTEE,) Adversary Proceeding No. 03-1540
)
Plaintiff,)
)
v.)
)
JOAN KODISH,) **ORDER**
)
Defendant.)

For the reasons stated in the memorandum of opinion filed this same date, the plaintiff's motion for summary judgment is denied and the defendant's motion for summary judgment is denied. (Docket 36, 37). The plaintiff is given leave to join A&A Paving, Inc. and Alfred Edwards and/or other entities which may claim an interest in the property which is the subject of this action as defendants and is to do so within 20 days from the date on which this order is entered.

IT IS SO ORDERED.

Date: 18 Jan 2015

Pat E. Morgenstern-Clarren
Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

To be served by clerk's office email and the Bankruptcy Noticing Center on:

Lauren Helbling, Esq.
Alexander Jurczenko, Esq.