

IT IS SO ORDERED.



Dated: March 23, 2007
03:43:00 PM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

CASE NUMBER 06-41031

WILLIAM JOHN McMONAGLE, SR. and
LESLIE ANN McMONAGLE,

HONORABLE KAY WOODS

Debtors.

ORDER DENYING MOTION TO DETERMINE VALUE

This cause is before the Court on Motion to Determine Value of Lien of the United States of America ("Motion to Determine Value") filed by Richard W. Epstein ("Epstein") on February 12, 2007. Epstein seeks to have this Court determine if "the U.S.A.'s FECA refund claim is fully secured in the Annuity and that the U.S.A. has a lien in the Annuity for the full value of its claim of \$114,794.50." (Motion to Determine Value at 5.) Two responses were filed, as follows: (i) United States' Response, on Behalf of the U.S. Department of Labor, to Motion to Determine the Value of the Lien of the United States of America filed by the United States

of America on behalf of the U.S. Department of Labor ("DOL") on March 9, 2007, and (ii) Debtor's (sic) Response to Motion to Value Collateral of Richard Epstein filed by Debtors William John McMonagle and Leslie Ann McMonagle ("Debtors") on March 8, 2007. Epstein filed Reply of Richard W. Epstein to Responses of Debtors and United States of America to Motion to Determine Value of Lien of the United States of America on March 14, 2007. The Court held a hearing on March 15, 2007.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334. 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)(K). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

I. FACTUAL AND PROCEDURAL BACKGROUND

Debtors filed a voluntary petition pursuant to chapter 7 of the Bankruptcy Code on July 13, 2006. Debtors scheduled DOL with two unsecured priority claims on Schedule E in the amounts of \$158,549.19 and \$114,794.50 (total \$273,343.69). The first meeting of creditors pursuant to § 341 of the Bankruptcy Code was set for September 5, 2006. As a consequence, the last day to file proofs of claim was ninety days thereafter (*i.e.*, December 5, 2006). (See FED. R. BANKR. P. 3002(c).) Epstein filed two proofs of claim on February 9, 2007, as follows: (i) Claim No. 2 on behalf of the United States of America as a secured claim in the amount of \$114,794.50; and (ii) Claim No. 3 on behalf of himself as an unsecured claim in the amount of \$114,794.50. Epstein filed Claim No. 2 on behalf of DOL pursuant to 11 U.S.C. § 501(b), which authorizes an entity that is liable to a creditor with the debtor

to file a claim on behalf of such creditor if the creditor does not file a proof of claim. (11 U.S.C. § 501(b)(West 2007).)¹

The following facts are taken from the motion and/or responses. On or about February 9, 1996, Mrs. McMonagle was employed by the United States Postal Service and she was injured while acting within the scope of her employment. Mrs. McMonagle was entitled to and received payments from the United States for those injuries. Mrs. McMonagle retained Epstein as her attorney to pursue her claims against Bell Atlantic, Inc. ("Bell") for her injuries. As a result, Bell settled with Mrs. McMonagle. The parties do not agree on the exact amount of the settlement. Because those details are not relevant to the Court's decision, the Court recites the amounts set forth in the Motion to Determine Value, but makes no finding about the accuracy of such amounts. The settlement was for \$700,000.00, of which Mr. McMonagle received \$70,000.00 for his loss of consortium claim. The settlement was paid in a lump sum of \$300,000.000 ("Lump Sum") and \$400,000.00 was used to purchase a GE Capital Annuity ("Annuity"). The Annuity provides for monthly payments to Mrs. McMonagle (either in the amount of \$2,755.94, as alleged by Epstein, or \$2,527.00, as asserted by Debtors) for 300 months beginning in November 2000.

Epstein retained \$210,000.00 of the Lump Sum as attorney fees. On or about May 18, 2006, DOL filed a civil action against Epstein in the United States District Court for the Western District of Pennsylvania seeking to recover \$114,794.50 allegedly owed from the Bell settlement to DOL as reimbursement for amounts paid to Mrs.

¹On March 16, 2007, DOL filed Proof of Claim #4 as an unsecured priority claim in the amount of \$273,343.69.

McMonagle under the Federal Employees Compensation Act, 5 U.S.C. § 8101 *et seq.* DOL alleges that Epstein and Mrs. McMonagle are jointly and severally liable for such reimbursement. Epstein filed a third party complaint against Mrs. McMonagle on July 25, 2006 (after the Petition Date), which was and remains stayed.

II. THE PARTIES' POSITIONS

Epstein argues that, since he and Mrs. McMonagle are jointly and severally liable to DOL, he is a party in interest that can move, pursuant to FED. R. BANKR. P. 3012, for a determination of the "value of a claim secured by a lien on property in which the estate has an interest." (FED. R. BANKR. P. 3012 (West 2007).) DOL argues that (i) Epstein lacks standing to bring the motion; and (ii) the requested relief can only be pursued as an adversary proceeding. Debtors contend that (i) Epstein lacks standing to have DOL's claim valued; (ii) there is no lien on the Annuity because it has changed character from the original settlement; (iii) Epstein should be estopped from filing a secured claim for DOL; (iv) the statute does not authorize a lien on assets received by Debtors; and (v) the relief can only be obtained pursuant to an adversary proceeding.

III. ANALYSIS

Epstein relies solely on Rule 3012 as the basis that he can proceed by motion and that an adversary proceeding is not necessary. Rule 3012 provides, "The court may determine the value of a claim secured by a lien on property in which the estate has an interest on motion of any party in interest and after a hearing on notice to the holder of the secured claim and any other entity as the court may direct." (FED. R. BANKR. P. 3012 (West 2007).) At first blush, Epstein's position appears to have merit. However,

further review demonstrates that the type of relief sought by Epstein must be obtained through an adversary proceeding rather than a motion. The Advisory Committee note to Rule 3012 provides, as follows:

Pursuant to § 506(a) of the Code, secured claims are to be valued and allowed as secured to the extent of the value of the collateral and unsecured, to the extent it is enforceable, for the excess over such value. The valuation of secured claims may become important in different contexts, e.g., to determine the issue of adequate protection under § 361, impairment under § 1124, or treatment of the claim in a plan pursuant to § 1129(b) of the Code. This rule permits the issue to be raised on motion by a party in interest. The secured creditor is entitled to notice of the hearing on the motion and the court may direct that others in the case also receive such notice. An adversary proceeding is commenced when the validity, priority, or extent of a lien is at issue as prescribed by Rule 7001. That proceeding is relevant to the basis of the lien itself while valuation under Rule 3012 would be for the purposes indicated above.

(Fed. R. Bankr. P. 3012, Advisory Committee note (West 2007).)

Rule 7001 provides that a "proceeding to determine the validity, priority or extent of a lien or other interest in property, other than a proceeding under Rule 4003(d)" is an adversary proceeding. (FED. R. BANKR. P. 7001(2). (West 2007).) It is clear from the relief requested by Epstein that he is not seeking to value the amount of the secured claim, but rather he wants the Court to determine the extent of DOL's lien in the Annuity. As such, the issue must be brought before the Court as an adversary proceeding. The motion is, therefore, procedurally incorrect and inadequate.

Since Epstein appears to rest his standing on the fact that he

is a "party in interest" for purposes of Rule 3012, which is not applicable here, it is unclear whether Epstein has standing. Moreover, Proof of Claim No. 2 filed by Epstein appears to be untimely. However, because it is not necessary for resolution of the Motion to Determine Value, the Court will not address the issue of Epstein's standing at this time.

Because the relief sought in the Motion to Determine Value is not properly before the Court, this motion is hereby denied.