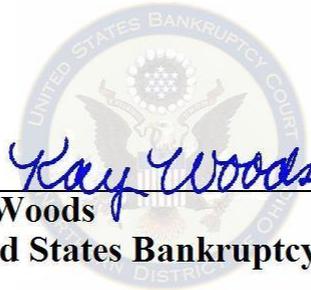


IT IS SO ORDERED.



Dated: October 21, 2010
09:16:39 AM

Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

ANNETTE D. PIZZUTO,

Debtor.

* * * * *

ANDREW W. SUHAR, TRUSTEE,

Plaintiff,

v.

ANNETTE D. PIZZUTO,
et al.,

Defendants.

CASE NUMBER 05-46652

ADVERSARY NUMBER 09-04330

HONORABLE KAY WOODS

MEMORANDUM OPINION REGARDING DEFENDANT ANNETTE D. PIZZUTO'S
CROSS-CLAIM AGAINST CO-DEFENDANT NADER HASAN

This cause is before the Court on a cross-claim asserted by
Debtor/Defendant Annette D. Pizzuto against Co-Defendant Nader Hasan

for legal malpractice ("Cross-Claim"). The Cross-Claim is set forth in Defendant's Answer and Cross-Claim ("Answer") (Doc. # 6) filed by Ms. Pizzuto on December 31, 2009. The Answer was filed in response to Adversary Proceeding to Avoid a Post-Petition Transfer, to Recover Money or Property; to Revoke the Debtor's Discharge; to Obtain a Declaratory Judgment Relating to the Foregoing and Other Relief ("Complaint") (Doc. # 1) filed by Andrew W. Suhar, Chapter 7 Trustee ("Trustee"), on November 30, 2009. Mr. Hasan failed to file a response to the Cross-Claim. For the reasons set forth below, this Court will, *sua sponte*, dismiss the Cross-Claim for lack of subject matter jurisdiction.

I. PROCEDURAL AND FACTUAL BACKGROUND

By way of background, on May 5, 2005, Mr. Hasan filed a personal injury action on behalf of Ms. Pizzuto in Virginia state court. (Compl., ¶¶ 8-9; Ans., ¶ 2.) On October 3, 2005 ("Petition Date"), Ms. Pizzuto filed a voluntary petition pursuant to chapter 7 of title 11, United States Code, which was denominated Case No. 05-46652 ("Main Case"). On May 4, 2006, this Court entered Order Authorizing the Employment of Attorney for Trustee for Special Purpose (Main Case, Doc. # 18), which authorized the Trustee to employ Mr. Hasan to pursue Ms. Pizzuto's personal injury action for the benefit of the estate.

The Trustee alleges that, at some time after Mr. Hasan was retained by the Trustee, Mr. Hasan advised the Trustee that the personal injury action had been dismissed and, thus, there would be

no recovery to benefit the estate. (Compl., ¶ 12.) The Trustee further alleges Mr. Hasan, in collusion with Ms. Pizzuto, re-filed the personal injury action without consulting the Trustee. (*Id.*, ¶¶ 13, 15.) In addition, the Trustee asserts, and Ms. Pizzuto admits, Mr. Hasan, in collusion with Ms. Pizzuto, settled the second personal injury action for the sum of \$20,000.00 ("Settlement") without consulting the Trustee. (*Id.*, ¶ 14-15; Ans., ¶ 2.) Finally, the Trustee asserts, and Ms. Pizzuto admits, Mr. Hasan and Ms. Pizzuto entered into the Settlement without the knowledge or consent of the Trustee and without the approval of the Court. (Compl., ¶ 15.; Ans., ¶ 2.)

On November 30, 2009, the Trustee filed the Complaint, which commenced the instant adversary proceeding. Due to the alleged conduct of Mr. Hasan and Ms. Pizzuto regarding the personal injury actions and Settlement, the Trustee seeks: (i) recovery of the Settlement from Mr. Hasan and Ms. Pizzuto, jointly and severally, pursuant to 11 U.S.C. § 549; (ii) recovery of unauthorized legal fees from Mr. Hasan pursuant to 11 U.S.C. § 330; (iii) damages from Mr. Hasan for fraud and breach of professional and fiduciary duties; (iv) damages from Mr. Hasan and Ms. Pizzuto, jointly and severally, for civil conspiracy;¹ and (v) revocation of Ms. Pizzuto's discharge

¹ On August 27, 2010, the Trustee filed Second Amended Motion of Andrew Suhar, Trustee to Approve Settlement with Nader Hasan, Esq. ("Settlement Motion") (Main Case, Doc. # 49), which is currently pending before this Court. In the Settlement Motion, the Trustee requests the Court to approve dismissal of the Complaint as to Mr. Hasan in consideration of the sum of \$3,000.00. (Settlement Mot. at 1-2.)

pursuant to 11 U.S.C. § 727(a) and (d).² (See Compl.)

On December 31, 2009, Ms. Pizzuto filed the Answer, in which she asserts the Cross-Claim against Mr. Hasan and "demands damages of \$20,000.00 plus an unspecified amount for damages to her credit resulting from the actions of Defendant Nader Hasan for legal malpractice." (Ans. at 2.) Mr. Hasan failed to file a response to the Cross-Claim.

II. STANDARD FOR REVIEW

Federal Rule of Civil Procedure 12(h)(3), made applicable to the instant adversary proceeding by Federal Rule of Bankruptcy Procedure 7012(b), requires a court to dismiss a proceeding for lack of subject matter jurisdiction. FED. R. CIV. P. 12 (West 2010); FED. R. BANKR. P. 7012 (West 2009). A court's lack of subject matter jurisdiction "may be raised at any time, by any party, or even *sua sponte* by the court itself." *Superior Bank, FSB v. Boyd (In re Lewis)*, 398 F.3d 735, 739 (6th Cir. 2005). The plaintiff has the burden of proving jurisdiction exists. *Rogers v. Stratton Indus., Inc.*, 798 F.2d 913, 915 (6th Cir. 1986). Furthermore, the parties themselves cannot consent to subject matter jurisdiction, "nor can it be waived." *Alongi v. Ford Motor Co.*, 386 F.3d 716, 728 (6th Cir. 2004). Therefore, "if jurisdiction is lacking, dismissal is mandatory." *Campanella v. Commerce Exch. Bank*, 137 F.3d 885, 890

² For the reasons set forth in Memorandum Opinion Regarding Trustee's Motion for Summary Judgment against Defendant Annette D. Pizzuto entered on this date, this Court granted summary judgment in favor of the Trustee revoking Ms. Pizzuto's discharge. (See Order (i) Granting Trustee's Mot. for Summ. J.; and (ii) Revoking Def. Annette D. Pizzuto's Discharge.)

(6th Cir. 1998).

28 U.S.C. § 1334 grants the district court "original and exclusive jurisdiction of all cases under title 11" and "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(a) and (b) (West 2010). 28 U.S.C. § 157(a) grants the district court the authority to refer this jurisdiction to the bankruptcy court. See 28 U.S.C. § 157 (West 2010). The United States District Court for the Northern District of Ohio referred jurisdiction to the bankruptcy courts of this district in General Order No. 84, which was entered on July 16, 1984.

A court need not distinguish between proceedings "arising under," "arising in," or "related to" a case under title 11 because "[t]hese references operate conjunctively to define the scope of jurisdiction. Therefore, for purposes of determining section 1334(b) jurisdiction, it is necessary only to determine whether a matter is at least 'related to' the bankruptcy." *Mich. Employment Sec. Comm'n v. Wolverine Radio Co. (In re Wolverine Radio Co.)*, 930 F.2d 1132, 1141 (6th Cir. 1991) (internal citations omitted). A proceeding is "related to" a bankruptcy if:

the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy[, in other words,] if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.

Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers (In

re *Dow Corning Corp.*), 86 F.3d 482, 489 (6th Cir. 1996) (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)).

"Bankruptcy jurisdiction will exist so long as it is possible that a proceeding may impact on 'the debtor's rights, liabilities, options, or freedom of action' or the 'handling and administration of the bankrupt estate.'" *Id.* at 491 (quoting *In re Marcus Hook Dev. Park, Inc.*, 943 F.2d 261, 264 (3d Cir. 1991)).

III. ANALYSIS

In the instant proceeding, Mr. Hasan did not object to this Court's jurisdiction over the Cross-Claim. However, a court may, *sua sponte*, determine if subject matter jurisdiction exists. *Superior Bank, FSB v. Boyd (In re Lewis)*, 398 F.3d 735, 739 (6th Cir. 2005). A bankruptcy court has "related to" jurisdiction over a proceeding if the proceeding could conceivably affect the administration of the bankruptcy estate. *In re Dow Corning Corp.*, 86 F.3d at 489. 11 U.S.C. § 541(a)(1) states:

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsection (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

11 U.S.C. § 541 (West 2009) (emphasis added). Accordingly, the estate only consists of property in which the debtor held an interest as of the petition date.

In *Stewart v. Henry (In re Stewart)*, 62 Fed. Appx. 610 (6th

Cir. 2003), the Sixth Circuit Court of Appeals held claims accruing after the petition date are not related to a debtor's bankruptcy proceeding and, thus, not within the subject matter jurisdiction of the bankruptcy court. Discussing a legal malpractice claim in the chapter 7 context, the Sixth Circuit Court of Appeals stated:

The malpractice claim itself does not constitute property of the estate. Under 11 U.S.C. § 541(a)(1), the estate comprises all legal or equitable interests of the debtor in property "as of the commencement of the case." The [debtors'] malpractice cause of action did not accrue until after they filed for bankruptcy, and is therefore not an interest in property as of the commencement of the case. . . . [T]herefore, this action is not related to the bankruptcy because the action cannot conceivably impact any property of the estate, or any right, liability, option or freedom of action of the [debtors] as the debtors in the Chapter 7 proceeding, or the handling and administration of the bankruptcy estate.

Another approach to determining whether an action is "related to" a bankruptcy proceeding is to determine whether the action would benefit the debtor and not the estate; if so, then the action would not be related to the bankruptcy case. 1 *Collier on Bankruptcy* P 3.01[4][c][v], 3-30 (15th Ed. Revised 1997). A suit brought on a cause of action which arose after the commencement of the bankruptcy case and therefore was not property of the estate would benefit the debtor, but not the estate. *Id.* . . . This suit benefits the [debtors] and not the estate, and it is therefore not related to the bankruptcy case.

Id. at 614 (emphasis in original).

As the party asserting the Cross-Claim, Ms. Pizzuto has the burden of proving jurisdiction exists. *Rogers v. Stratton Indus., Inc.*, 798 F.2d 913, 915 (6th Cir. 1986). Ms. Pizzuto does not assert any basis for this Court to exercise subject matter jurisdiction over the Cross-Claim. (See Ans.) In fact, the record is devoid of the basis for the Cross-Claim, except that it is "for

legal malpractice.” (*Id.*)

A cross-claim, by definition, “arises out of the transaction or occurrence that is the subject matter of the original action.” FED. R. CIV. P. 13(g) (West 2010).³ Accordingly, the conduct serving as the basis for the Cross-Claim is necessarily the same conduct serving as the basis for the Complaint – *i.e.*, the post-petition commencement and settlement of the second personal injury action. Therefore, the Cross-Claim did not accrue until after the Petition Date.

Because the Cross-Claim did not accrue until after the Petition Date, the Cross-Claim is not property of the estate and any recovery pursuant to the Cross-Claim would benefit Ms. Pizzuto, rather than the estate. See 11 U.S.C. § 541(a)(1); *In re Stewart*, 62 Fed. Appx. at 614. As a result, resolution of the Cross-Claim cannot have any effect on the administration of the estate or Ms. Pizzuto, in her capacity as the debtor, and, thus, this Court does not have “related to” subject matter jurisdiction over the Cross-Claim. Accordingly, this Court will, *sua sponte*, dismiss the Cross-Claim for lack of subject matter jurisdiction. This Court’s holding does not address the legal sufficiency of the Cross-Claim.

IV. CONCLUSION

A court may, *sua sponte*, address whether it has subject matter jurisdiction over a proceeding. Pursuant to 28 U.S.C. § 1334(b),

³ Federal Rule of Civil Procedure 13 is made applicable to the instant adversary proceeding by Federal Rule of Bankruptcy Procedure 7013. See FED. R. BANKR. P. 7013 (West 2009).

a proceeding must, at a minimum, "relate to" a case under title 11 for a bankruptcy court to have subject matter jurisdiction over the proceeding. A bankruptcy court has "related to" subject matter jurisdiction over a proceeding if the proceeding could conceivably affect the bankruptcy estate or the debtor, as the debtor.

In the instant proceeding, the Cross-Claim accrued post-petition and, thus, is not property of the estate. Therefore, resolution of the Cross-Claim cannot have any effect on the administration of the estate of Ms. Pizzuto, in her capacity as the debtor. Accordingly, this Court does not have subject matter jurisdiction over the Cross-Claim; this Court will, *sua sponte*, dismiss the Cross-Claim for lack of subject matter jurisdiction.

An appropriate order will follow.

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for legal malpractice ("Cross-Claim"). The Cross-Claim is set forth in Defendant's Answer and Cross-Claim ("Answer") (Doc. # 6) filed by Ms. Pizzuto on December 31, 2009. The Answer was filed in response to Adversary Proceeding to Avoid a Post-Petition Transfer, to Recover Money or Property; to Revoke the Debtor's Discharge; to Obtain a Declaratory Judgment Relating to the Foregoing and Other Relief ("Complaint") (Doc. # 1) filed by Andrew W. Suhar, Chapter 7 Trustee, on November 30, 2009. Mr. Hasan failed to file a response to the Cross-Claim.

For the reasons set forth in this Court's Memorandum Opinion Regarding Defendant Annette D. Pizzuto's Cross-Claim against Co-Defendant Nader Hasan entered on this date, this Court hereby dismisses the Cross-Claim for lack of subject matter jurisdiction.

IT IS SO ORDERED.

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