

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN

FILED
JUN 24 1985
CLERK
U.S. BANKRUPTCY COURT

In re:

Case Number:

THOMAS MICHAEL CRIDER
LINDA CAROLYN CRIDER,

EF7-84-01139

Debtors.

THOMAS MICHAEL CRIDER
LINDA CAROLYN CRIDER,

Plaintiffs,

Adversary Number:

v.

84-260-7

AFFILIATED HOSPITAL SERVICES;
THOMAS G. ARMSTRONG; ROBERT D.
COMER & ASSOCIATES; DONALD J.
FAST; HOWARD S. FELDMAN;
DR. DAVID HENDRICKSON; HUDSON
MEMORIAL HOSPITAL; DR. EARL
JACOT; DOAR, DRILL & SKOW, S.C.;
LAKEVIEW MEMORIAL HOSPITAL;
MOUND PARK HOSPITAL; NORTHWESTERN
COURT REPORTERS; KENNETH E. OGREN;
RIVER FALLS AREA HOSPITAL; ST.
CROIX ORTHOPAEDICS, P.A.; SISTER
KENNY INSTITUTE and DRS. SODERBERG,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND
ORDER DISMISSING COMPLAINT

Plaintiffs Thomas Michael and Linda Carolyn Crider seek recovery of certain specified funds which were disbursed from a trust held on their behalf by Defendant Doar, Drill and Skow, S.C. (Doar); a hearing having been held; Plaintiffs appearing by Attorney Russell Berg (Attorney D. Peter Seguin on brief),

Defendant Doar appearing by Attorney Thomas R. Schumacher and Defendant Thomas G. Armstrong appearing on his own behalf; the Court, being fully advised in the premises, FINDS THAT:

1. Plaintiffs filed a Chapter 7 Bankruptcy Petition on June 7, 1984.

2. Prior to the bankruptcy filing attorneys from Doar represented Plaintiffs in a personal injury action they had initiated and Plaintiff Linda Crider against a charge of drunk driving.

3. Also prior to the Chapter 7 filing Thomas G. Armstrong represented Linda Crider during divorce proceedings with her previous husband.

4. On March 23, 1984, Doar disbursed funds from Plaintiffs' trust account which had been established with funds recovered in their personal injury lawsuit. A disbursement was made to Attorney Donald Fast from Doar as payment for defending Linda Crider in her drunk driving case. A further disbursement was made to Doar itself as reimbursement for payments it had made for services rendered to prepare the Plaintiffs' lawsuit.

5. After obtaining a default judgment against Linda Crider for the amount owed for legal services in her divorce action Defendant Armstrong filed a garnishment action on March 29, 1984, naming Doar as garnishee defendant. On April 10, 1984, Doar responded to the garnishment Complaint by submitting \$1,488.91 to the St. Croix County Clerk of Court.

DISCUSSION

6. Plaintiffs are attempting to avoid the transfers outlined above pursuant to 11 U.S.C. §522(h).

7. Defendant Armstrong contends that an avoidance should not be allowed because Plaintiffs voluntarily granted him an attorney's lien on the proceeds from their lawsuit.

8. State law governs the issue of attorney's liens in bankruptcy actions. Matter of Richland Building Systems, Inc., 40 B.R. 156, at 157 (Bankr.W.D.Wis. 1984). In Richland, the court discussed the three types of attorney's liens recognized in Wisconsin. These are a statutory lien under sec. 757.36, Stats., a lien on the client's papers and an equitable lien. Id. An equitable lien exists generally where there is a written contract manifesting intent to charge particular property with payment of the debt for the services. Id.

9. A written agreement or contract is not necessary for the existence of an equitable attorney's lien. Huntzinger v. Jacobs, 33 Wis.2d 703, 148 N.W.2d 86 (1967); Freyer v. Mutual Benefit Health & Accident Assn., 45 Wis.2d 106, 172 N.W. 2d 338 (1969). In Freyer the attorney performed services for the same client on two separate matters. The attorney sought to be reimbursed for his work in both cases out of the client's settlement amount in the second case. The court stated that the attorney had a statutory lien for his fees on the second case. Freyer, 45 Wis.2d at 110, 172 N.W.2d 338. However, it ruled that there was no other general lien on the settlement proceeds because there

was no specific agreement providing for disbursement of the settlement to pay the attorney for prior legal work. Id. at 111.

10. Based on the evidence in this case the Court concludes that Plaintiffs and Defendant Thomas Armstrong entered into precisely the type of agreement that was lacking in Freyer. Plaintiff Linda Crider agreed to pay Armstrong for his services on her divorce action out of the proceeds of her personal injury claim. This provided Armstrong with an equitable lien in the settlement proceeds for the amount owed for his legal services.

11. Plaintiffs contend that the only lien that Defendant Armstrong possessed was a judicial lien. 11 U.S.C. §101(30) defines a judicial lien as one obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding. The lien obtained by Armstrong was an equitable attorney's lien under Wisconsin law, provided by agreement of the parties. The fact that a judgment was obtained after the existence of this lien does not abrogate it or convert it into a judicial lien. The attorney's equitable lien itself was not obtained by judgment or other legal process.

12. The amount of \$1,488.91 which was turned over to Defendant Armstrong in response to the garnishment complaint has been claimed as exempt by the Plaintiffs in schedule B-4 of their bankruptcy petition. Property exempted under sec. 522 of the Code is liable for pre-commencement debts that are secured by a lien that is not avoided under certain specific sections of the Code. 11 U.S.C. §522(c)(2).

13. Defendant Armstrong's equitable attorney's lien securing the pre-commencement debt for legal services is not avoidable under any of these specific sections. Since the lien attached more than 90 days before filing of the bankruptcy petition it cannot be avoided under sec. 547 of the Code. Further the lien cannot be avoided under sec. 522(f)(1) as a judicial lien. Plaintiffs' settlement proceeds are consequently liable for the attorney's fee debt to Defendant Armstrong.

14. The remaining issue in this matter is whether the other transfers from Plaintiffs' trust account are avoidable transfers. Doar maintains that they are rendered unavoidable by 11 U.S.C. §547(c)(2) because they were payment of a debt incurred in the ordinary course of business or financial affairs of the Debtor and transferee. Plaintiffs argue that the transfers were not in the ordinary course of their business or financial affairs since there was no agreement between the parties as to what fee arrangement existed. Alternatively, they claim the transfers were not normal or usual for them.

15. The evidence in this case concerning the fee arrangement between Doar and Plaintiff is in conflict. However, Doar's evidence regarding the fee arrangement is more credible and persuasive. The Court is convinced that the parties had agreed that if Plaintiffs recovered an amount on their claim they would pay Doar one-third of that amount as a fee in addition to costs, disbursements and the attorney fee owed Donald Fast of Doar for defending Linda Crider against drunk driving charges. The court's conclusion is bolstered by the fact that there is no

evidence that Plaintiffs objected to paying Doar for the money it had expended for costs when they received their proceeds from Doar.¹

16. The legislative history of section 547's "ordinary course" exception makes it clear that the purpose was to leave normal financial relations undisturbed since that would not be a detriment to the policy of discouraging unusual action by the debtor or creditors in the immediate period before bankruptcy filing. Analysis of H.R. 8200, H.R.Rep.No. 595, 95th Cong. 1st Sess.373 (1977).

17. The Court concludes that these transfers fall within the "ordinary course" exception. The fee arrangement and payment of costs that took place were according to ordinary or normal legal business terms. It would be unusual for a law firm to agree to pay the costs of litigation out of its own fee. These transfers were not unusual for Plaintiffs in the sense that the term "unusual" is relevant here. If individuals such as Plaintiffs need an attorney it is not unusual that fees would be paid as they were here. The fees were paid when the recovery took place. The fact that this may not have been common for the Plaintiffs merely reflects the fact that most people do not require legal assistance on a continuous basis.

¹ The likelihood of an agreement that Doar would pay the costs of litigation is quite slim considering that such an agreement would be an illegal champertous agreement. Stearns v. Felker, 28 Wis. 594 (1871). The Wisconsin Code of Professional Responsibility, SCR 20.26(2), prohibits an attorney from advancing costs of litigation unless the client remains ultimately liable for those expenses.

CONCLUSIONS OF LAW

1. The proceeds of Plaintiffs' personal injury action are liable for Plaintiff Linda Crider's attorney's fee debt to Defendant Thomas G. Armstrong, pursuant to 11 U.S.C. §522(c)(2).

2. The transfer to Defendant Armstrong is not an avoidable transfer under 11 U.S.C. §522(h).

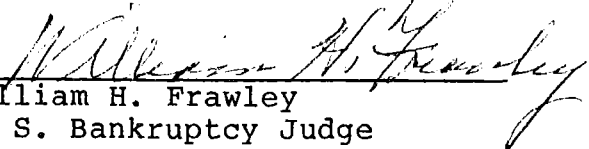
3. The remaining transfers which Plaintiffs seek to avoid occurred in the ordinary course of business or financial affairs of the Plaintiff and transferees and as such are unavoidable pursuant to 11 U.S.C. §547(c)(2).

ORDER

IT IS ORDERED THAT the Complaint against the Defendants in this action be dismissed in its entirety without costs.

Dated: June 24, 1985.

BY THE COURT:



William H. Frawley
U. S. Bankruptcy Judge

cc: Attorney Russell Berg
Attorney D. Peter Seguin
Attorney Thomas R. Schumacher
Hon. Thomas G. Armstrong