IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF PUERTO RICO

In re:	:	
	:	
JULIO A. WESTERN VARGAS,	:	Case No. 90-05567 (GAC)
CARMEN D. QUIÑONES ALVIRA,	:	
	:	
Debtors	:	
	:	Chapter 7
	:	
DIEGO FERRER, TRUSTEE,	:	
	:	
Plaintiff	:	
	:	
v.	:	Adv. No. 95-0025
	:	
JULIO A. WESTERN VARGAS,	:	
CARMEN D. QUIÑONES ALVIRA,	:	
and ALVARO R. CALDERON, JR.,	:	
	:	
Defendants	:	

DECISION AND ORDER

This proceeding is before the Court on the motion of the defendant, Alvaro Calderon, Jr. ("Calderon"), for summary judgment pursuant to Fed.R.Civ.P. 56, made applicable to adversary proceedings in bankruptcy cases by Fed.R.Bankr.P. 7056 (Dkt. #41). The trustee has filed an opposition to Calderon's motion for summary judgment, as well as a cross-motion for summary judgment (Dkt. #46). Calderon has filed a reply to the trustee's opposition to his motion for summary judgment and a opposition to the trustee's motion for summary judgment.

In the trustee's amended complaint, he seeks to recover from Calderon an unauthorized post-petition transfer of property of the estate. Calderon requests summary judgment against the trustee claiming that the trustee's action must be brought under 11 U.S.C. § 549 and that the statute of limitations under this section has expired. The trustee requests summary judgment against Calderon, arguing that Calderon has admitted all of the facts necessary to hold him liable under 11 U.S.C. § 542. In Calderon's opposition to the trustee's request for summary judgment, he argues that the Court should dismiss the complaint due to laches. He also argues that he had a ownership right in the property received and that at the time of the transfer, the property received was of inconsequential value to the estate. For the reasons stated below, the Court denies both motions for summary judgment.

FACTS

1. On August 21, 1990, debtor Carmen D. Quiñones Alvira ("Quiñones") filed a complaint, represented by attorney Alvaro R. Calderón, Jr. ("Calderón"), in the U.S. District Court for the District of Puerto Rico, Civil No. 90-2125 (PG) ("district court case"), for personal injury.

2. On October 16, 1990, the debtors filed a petition for

relief under Chapter 13 of the Bankruptcy Code.

3. The debtors' bankruptcy schedules listed the district court case as personal property of the debtors. Likewise, the statement of affairs indicated that Quiñones was the plaintiff in the district court case.

4. On April 24, 1991, the bankruptcy case was converted to Chapter 7.

5. On May 8, 1991, Diego Ferrer was appointed as the Chapter 7 trustee ("trustee"), which position he still holds.

6. On August 31, 1992, the district court case was settled for the sum of $185,000. Of this sum, Calderón received the amount of $63,975.00 for attorney's fees and costs.

7. No application was filed with the bankruptcy court for the appointment of Calderón as special counsel for the estate, nor did Calderón file an application for compensation with the bankruptcy court for the fees and costs received in connection with the district court case.

8. Quiñones received the sum of $121,025.00 from the settlement proceeds in the district court case.

9. On February 22, 1995, the trustee filed this adversary proceeding seeking an order requiring Calderón to disgorge the payment received related to the district court case.

10. As of March 1, 1995, the claims filed against this estate totalled $122,553.86.

JURISDICTION AND PROCEDURE

The Court has jurisdiction over this proceeding pursuant to 28 U.S.C. § 1334(b) as a matter arising under 11 U.S.C. § 542 of the Bankruptcy Code. This is a core proceeding under 28 U.S.C. § 157(b)(2)(E).

STANDARD FOR SUMMARY JUDGMENT

Under Fed.R.Civ.P. 56(c), made applicable to bankruptcy proceedings by Fed.R.Bankr.P. 7056, summary judgment is only proper if the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322, (1986). Summary judgment cannot be granted if there are issues of material fact. A material issue is one that affects the outcome of the litigation. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Whether an issue is material must be determined based on the substantive law. Id.

DISCUSSION

Property of the Estate

The trustee seeks to recover the $63,975.00 payment made to Calderón in August of 1992 as property of the estate. Calderón states, that for the purposes of these motions only, he will concede that the funds that the trustee seeks to recover were property of the estate. Not only for the purposes of determining these motions, but as a matter of law, the Court concludes that the funds that the trustee seeks to recover were property of the estate. In determining what is property of the estate, the court must look at the interaction between state law and bankruptcy law.

> Whether the debtor has a legal or equitable interest in property is a question of applicable nonbankruptcy law, usually state law. Once it is established that, under applicable nonbankruptcy law, the debtor has a legal or equitable interest in property as of the petition date, the question of whether that interest is estate property is strictly a question of bankruptcy law.

1 Robert E. Ginsberg & Robert D. Martin, Bankruptcy Text, Statutes, Rules, § 5.01[b][1] (3d ed. Supp. 1994)(footnotes omitted).

In the present case, at the time of the filing of the bankruptcy petition, the debtor Quiñones was the plaintiff in the district court case. Under state law the debtor had a property interest in the district court case. Accordingly, whether the

cause of action became property of the estate upon the filing of the bankruptcy petition, is determined only by bankruptcy law. The Bankruptcy Code indicates, with certain exceptions not applicable here, that the estate is composed of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). Thus, under this section, the settlement in the district court case became property of the bankruptcy estate at the time of the filing of the petition. Any amounts subsequently paid to Quiñones and Calderon resulting from the settlement reached in the district court case were also property of the bankruptcy estate as proceeds of property of the estate pursuant to 11 U.S.C. § 541(a)(6).

Statute of Limitations for Filing Avoidance Actions Under § 549 Does Not Apply to Turnover Actions Brought Under § 542

Ordinarily, when an entity receives an unauthorized transfer of property of a Chapter 7 bankruptcy estate, the trustee may seek recovery of the unauthorized transfer under 11 U.S.C. § 549. This section allows a trustee to avoid an unauthorized transfer of property of the estate. In the present case, however, any attempt by the trustee to recover the post-petition payments to Calderón under § 549 is clearly barred by §

549's two year statute of limitations.

The trustee in this case seeks to recover the payments made to Calderón under 11 U.S.C. § 542. This section provides that:

> Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, . . . shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

11 U.S.C. § 542(a). Citing the legislative history of this section, it is Calderón's position that 11 U.S.C. § 542 only applies to entities holding property of the estate on the date of the filing of the petition.

The Court notes that the statute itself refers to an entity in possession, custody or control of property "during the case". This suggests that application of the section is not limited to entities holding property of the estate on the date of the filing of the petition. Moreover, the Court finds that the legislative history of the statute is in conflict. While portions of the legislative history suggest that 11 U.S.C. § 542 only applies to entities holding property of the estate on the date of the filing of the petition, the legislative history also states that:

> [s]ubsection (a) of this section requires anyone holding property of the estate on the date of the

> filing of the petition, or property that the trustee may use, sell, or lease under section 363, to deliver it to the trustee.

(HR rep. No. 595, 95th Cong, 1st Sess. 369 (1977); S. Rep. No. 989, 95th Cong, 2d Sess. 84 (1978)). It further provides that, "[t]he section makes clear that any entity, other than a custodian, is required to deliver property of the estate to the trustee or debtor in possession whenever such property is acquired by the entity during the case. . . ." (124 Cong.Rec. H11096-97 (daily ed. Sept. 28, 1978); S17413(daily ed. Oct. 6, 1978); remarks of Rep. Edwards and Sen. DeConcini). Based on the language of the statute and the legislative history, the Court does not find the argument compelling that the statute, on its face or based on its legislative history, only applies to entities holding property of the estate on the date of the filing of the petition.

In addition to the fact that the language of § 542 and portions of the legislative history strongly suggest that it applies to entities holding property of the estate during the case, it is also true that often there is more than one section that a trustee may proceed under to recover unauthorized post-petition transfers. Although § 549 would be the most obvious section under which to proceed, if it were available, the trustee

in this case may just as easily seek relief under 11 U.S.C. § 362. This section does not have a statute of limitations while a case remains open and may be used even when the § 549 limitation period has expired. See generally, In re Germansen Decorating, Inc., 149 B.R. 517 (Bankr. N.D.Ill. 1992). Thus, the Court finds that § 549 applies to actions to recover property of the estate brought under § 549, but that it does not place a time limit on actions for turnover of property that may be brought under other sections, such as §§ 542 and 362.

Although not in the language of the statute, there is some time limitation for bringing an action under § 542. The Court in In re Berry, 59 B.R. 891 (Bankr. E.D.N.Y. 1986), held that "[g]ood reason and sound practice dictate that actions under § 542(a) be commenced within a reasonable period of time." 59 B.R. at 898. This Court finds that there is an implicit "reasonable period of time" limitation for bringing an action under § 542 and in the present case, it may have expired. The trustee in this case waited more than two years to bring the action against Calderón. As of yet, the trustee has provided no explanation for his delay in bringing suit and prior to that for his failure to get involved in the district court case. The trustee's delay is especially significant in this case because the funds received by

the debtor would have been sufficient to pay all of her debts in full. The Court concludes that in order for the trustee to use § 542 to obtain turnover of the post-petition payment to Calderón, the trustee must provide sufficient justification for his delay in bringing suit.

Necessity of Attorney Appointment to Represent Estate and Necessity of Filing Application for Compensation to Receive Payment for Services

Under the Bankruptcy Code, an attorney seeking to pursue a cause of action on behalf of the estate, must be appointed for this purpose by the Bankruptcy Court. The Bankruptcy Code provides that:

> the trustee, with the court's approval, may employ one or more attorneys . . . 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). In 1990, when this petition was filed, the Federal Rules of Bankruptcy Procedure provided that:

> [a]n order approving the employment of attorneys . . . pursuant to § 327 . . . of the Code shall be made only on application of the trustee or committee, stating the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, or any other party in interest,

> their respective attorneys and accountants. The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, or any other party in interest, their respective attorneys and accountants.

Fed.R.Bankr.P. 2014(a).

Even after an order approving the employment of an attorney is entered, the attorney must file an application for compensation before the Bankruptcy Court in order to be compensated for services performed. The Bankruptcy Code provides that "[a]fter notice to any parties in interest and the United States Trustee and a hearing, . . . the court may award to a . . . professional person employed under section 327 . . . reasonable compensation for actual, necessary services rendered by the . . . professional person, or attorney . . . ." 11 U.S.C. § 330(a)(1)(A). The Federal Rules of Bankruptcy Procedure also provide that:

> An entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file with the court an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested. An application for compensation shall include a statement as to what payments have theretofore been made or promised to the applicant for services rendered or to be rendered in any capacity whatsoever in connection with the case, the source of the compensation so paid or promised, whether any compensation previously received has been

> shared and whether an agreement or understanding exists between the applicant and any other entity for the sharing of compensation received or to be received for services rendered in or in connection with the case, and the particulars of any sharing of compensation or agreement or understanding therefor, except that details of any agreement by the applicant for the sharing of compensation as a member or regular associate of a firm of lawyers or accountants shall not be required. The requirements of this subdivision shall apply to an application for compensation for services rendered by an attorney or accountant even though the application is filed by a creditor or other entity. Unless the case is a chapter 9 municipality case, the applicant shall transmit to the United States trustee a copy of the application.

Fed.R.Bankr.P. 2016(a).

One of the inherent powers and duties of a bankruptcy court relates to reviewing fees paid to professionals. In re E Z Feed Cube Co., Ltd., 123 B.R. 69, 73 (Bankr. D.Or. 1991). The Court derives the ability to review fees sua sponte from 11 U.S.C. § 105(a), which provides that:

> [t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 105(a). The Court in In re E Z Feed Cube Co., Ltd., held that the trustee could have funds turned over pursuant

to 11 U.S.C. § 105(a), despite that the statute of limitations under § 549 had expired. The Court reasoned that:

> [i]t is of the utmost importance that [the] court act to preserve the integrity of the bankruptcy system and to maintain public confidence therein. This court must regulate the conduct of its officers to ensure that such conduct complies with the Bankruptcy Code and Rules.

Id. at 74. The court also pointed out in a footnote that "[i]t must be remembered that no applications or notice were ever sent to creditors apprising any interested party or the court of the payments received by the defendant." Id. at 74 n.2.

In this case, Calderón did not file an application for appointment to represent the estate, nor did he file an application for compensation to receive funds that were property of the estate. None of the funds from the settlement of the district court case were turned over to the trustee. Creditors and other parties in interest did not receive notice of a request for fees by Calderón. Thus, the payments made to Calderón were improper as a matter of law if he was aware of the bankruptcy petition and it would be within the Court's power to order disgorgement of the funds received.

An attorney, however, may be appointed *nunc pro tunc* to represent the estate and have fees approved retroactively, if the

failure to initially seek appointment was due to excusable neglect. In this case, Calderón has provided an affidavit indicating that he did not obtain any knowledge of the bankruptcy proceeding through the debtors, nor did he receive any communication from the trustee. The trustee has provided the affidavit of Zaida I. Bailey, the daughter of debtors, who indicates that she herself, her sister and her mother all informed Calderón of the bankruptcy case on more than one occasion. Thus, whether Calderón had knowledge of the bankruptcy case at the time of the transfer appears to be a contested fact. It is a material fact because if Calderón was not aware of the petition, he could not have sought appointment to represent the estate and he would clearly be eligible for appointment *nunc pro tunc*. If Calderón was aware of the bankruptcy, he may be liable to the estate for the funds received.

Violation of the Automatic Stay

When Calderón acquired the funds the automatic stay of 11 U.S.C. 362 applied. The Bankruptcy Code provides that:

> (1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and
> (2) the stay of any other act under subsection (a) of this section continues until the earliest of-
> (A) the time the case is closed;
> (B) the time the case is dismissed; or

> (C) if the case is a case under chapter 7 of this title concerning an individual . . . the time a discharge is granted or denied.

11 U.S.C. § 362(c). "The language of section 362(c) is clear and unambiguous. In the case of an act against property of the estate, the stay continues until the property is no longer property of the estate." 2 Collier on Bankruptcy 362-62, (15th ed. Supp. 1995).

In the present case, the debtors received a discharge of their debts, but the case remained open. Because the funds collected by Calderón had not been abandoned by the trustee, they were still property of the estate. The Bankruptcy Code prohibits "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3). "The third paragraph of section 362(a) is directed to actions, whether judicial or private, seeking to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." 2 Collier on Bankruptcy 362-38 (15th ed. Supp. 1995)(footnote omitted). Moreover, it is irrelevant whether the debtors voluntarily made the transfer to Calderón. See In re Germansen Decorating, Inc., 149 B.R. 517 (Bankr. N.D.Ill. 1992). Thus, if Calderón was aware of the bankruptcy

case, his actions in taking possession of the funds were in violation of the automatic stay. Actions in taking possession of property of the estate in violation of the stay are generally void and without legal effect, unless condoned by the court. I.C.C. v. Holmes Transp., Inc., 931 F.2d 984, 987-88 (1st Cir. 1991)(citations omitted). As discussed by the Court in In re Germansen Decorating, Inc., 149 B.R. at 520, since there is no statute of limitations, while a case remains open, for recovery of property obtained in violation of the stay, the trustee may be entitled to recover the payments made to Calderón pursuant to this section.

CONCLUSION

The Court concludes that the statute of limitations found in 11 U.S.C. § 549 does not apply to actions brought pursuant to other sections of the Bankruptcy Code. The Court concludes that the trustee may have a right of recovery against Calderón under 11 U.S.C. §§ 542(a), 105(a) and 362. Calderón, however, has raised defenses that may defeat the trustee's right of recovery. There are material issues of fact as to Calderón's awareness of the debtors' bankruptcy petition and as to the basis for the trustee's delay in filing this adversary proceeding. Accordingly, both Calderón's motion for summary judgment and the

trustee's cross motion for summary judgment will be denied.

ORDER

Wherefore, IT IS ORDERED that the motion for summary judgment filed by the defendant, Alvaro Calderon, Jr., (Dkt. #41) is DENIED.

IT IS FURTHER ORDERED that the trustee's cross-motion for summary judgment (Dkt. #46) is DENIED.

SO ORDERED.

San Juan, Puerto Rico, this _____ day of May, 1996.

BY THE COURT:

_____
GERARDO A. CARLO
U.S. Bankruptcy Judge