

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

In re:

Case No. 6:05-bk-04616-ABB
Chapter 7

CARMELLA C. GREEN,

Debtor.

ORDER

This matter came before the Court on the Motion for Determination of Priority for Claims Filed by Personal Injury Attorneys for the Debtor and Other Related Claims¹ (“Application”) filed by Carla Musselman, the Chapter 7 Trustee herein (“Trustee”). The Trustee seeks direction as to what distribution, if any, should be made to certain attorneys who were involved with a personal injury suit instituted by Carmella C. Green, a/k/a Carmella Crosen, the Debtor herein (“Debtor”). Fidelity Settlement Funding LLC also asserts entitlement to distribution. An evidentiary hearing on the Motion was held on January 9, 2006 and the parties were granted additional time to file position statements. The parties filed various statements² and the Trustee filed an Objection to Claims, objecting to Claim No. 4 and Claim No. 5.³ The Court makes the following Findings of Fact and Conclusions of Law after reviewing the pleadings and evidence, hearing argument, and being otherwise fully advised in the premises.

FINDINGS OF FACT

The Debtor filed this Chapter 7 case *pro se* on April 26, 2005 (“Petition Date”). John M. Cooper, Esquire, was holding funds in the amount of \$30,000.00 (the “Funds”) in his trust account on the Petition Date. The Funds were obtained through the resolution of a personal injury action instituted by the Debtor prepetition for injuries she suffered in a traffic accident occurring on or about February 5, 2000 in North Carolina. The Debtor was a resident of Capon Bridge, West Virginia at the time of the accident. The litigation went to trial in North Carolina and a jury verdict in the amount of \$30,000.00 was rendered in favor of the Debtor. The Debtor and her

counsel had expected a larger jury award and were disappointed by the outcome of the trial. The Trustee’s objection to the Debtor’s claim of exemption of the Funds was previously sustained.⁴ The Funds constitute property of the estate and are in possession of the Trustee.

Several attorneys were involved in the personal injury litigation, who each assert entitlement to payment of attorneys’ fees and costs from the Funds. The attorneys asserting entitlement to payment are: (i) Lawrence E. Sherman, Jr. with the Sherman Law Firm located in Romney, West Virginia (“Sherman”); (ii) John M. Cooper with the law firm of Hajek, Shapiro, Cooper & Lewis, P.C. located in Virginia Beach, Virginia and who is licensed to practice law in North Carolina (“Cooper”); (iii) Mike Anderson with the Anderson Law Firm located in Wilson, North Carolina (“Anderson”); and (iv) James F. Rogerson with the law firm of Connor, Bunn, Rogerson & Woodard, PLLC located in Wilson, North Carolina (“Rogerson”). Sherman, Cooper, and Anderson have filed position statements. Rogerson has not entered an appearance in this case. The attorneys do not agree as to what amount each is entitled to and take divergent positions in their pleadings. All of the charges for services performed and costs incurred by the attorneys in relation to the Debtor’s personal injury litigation arose prepetition. None of the attorneys’ or other creditors’ claims are entitled to administrative priority status.

Five claims totaling \$46,354.80 were timely filed in this case.⁵ Sherman asserts an unsecured claim in the amount of \$17,419.42 (Claim No. 1). Wilson Memorial Hospital and Winchester Medical Center assert unsecured claims in the amounts \$546.00 and \$3,255.20, respectively (Claim Nos. 2 and 3). Cooper asserts a secured claim of \$17,954.18 (Claim No. 4). Fidelity Settlement Funding LLC (“Fidelity”) asserts a secured claim of \$7,180.00 (Claim No. 5). The Trustee has incurred administrative costs in carrying out her duties in this case, including attorney’s fees and costs.

The Trustee objects to Claim Numbers 4 and 5 on the basis the claims are not secured. The

¹ Doc. No. 17.

² Doc. Nos. 27, 30, 31, 32, 33.

³ Doc. No. 34.

⁴ Order Sustaining Objection to Debtor’s Claim of Exemptions (Doc. No. 12) (The Debtor’s claim of exemptions for personal property was limited to \$1,000 and she was provided fifteen days to select the personal property subject to exemption or to purchase the non-exempt personal property from the Trustee. The Debtor has filed no response in accordance with the Order.)

⁵ The deadline for filing claims was November 14, 2005.

Trustee properly filed and served her claim objections. Fidelity has not filed a response to the Trustee's objection. Fidelity attached to its claim (Claim No. 5) a document entitled Transfer and Conveyance of Proceeds and Security Agreement ("Security Agreement") executed by Fidelity and the Debtor on December 19, 2001. Fidelity loaned \$3,000 to the Debtor for living expenses and the Debtor granted Fidelity an "interest in the first \$7,180.00" in the Funds pursuant to the Security Agreement.⁶ Sherman acknowledged the Security Agreement.⁷ Fidelity has not established it properly perfected its alleged lien against the Funds. Fidelity has not established its claim is entitled to secured status. It holds an unsecured nonpriority claim in the amount of \$7,180.00.

Sherman and the Debtor executed a Retainer and Power of Attorney in 2001 ("Engagement Letter") in which the Debtor engaged Sherman to represent her in resolution of the personal injury action and agreed to pay Sherman 33 1/3% of "of the gross amount recovered."⁸ The Engagement Letter was executed in West Virginia. It does not contain a provision allowing an attorney charging lien or the engagement of other counsel. Sherman is entitled to 33 1/3% of \$30,000.00 (the gross amount recovered in the Debtor's personal injury action), or \$9,999.99, pursuant to the terms of the Engagement Letter. Sherman asserts an unsecured nonpriority of claim of \$17,419.42 (Claim No. 1), consisting of \$7,243.25 for costs advanced.⁹ The balance of \$10,176.17 apparently relates to counsel's contingency fee, but no calculation or breakdown of the claim amount was provided.

Cooper asserts a secured claim (Claim No. 4) against the Funds in the amount of \$17,954.18 on the ground he has an attorney's lien on the Funds pursuant to Virginia state law. The claim amount does not coincide with the supporting documents attached to the claim, which set forth costs advanced totaling \$19,842.16. The cost total includes the amount of \$7,243.25 for costs advanced by Sherman and included in Claim No. 1. The amount of

\$7,243.25 in Claim No. 4 is duplicative and shall not be allowed as part of Claim No. 4.

Cooper's claim does not set forth the services provided by Cooper and the time expended. There is no contract evidencing an attorney-client relationship between the Debtor and Cooper in which Cooper was engaged to prosecute the personal injury action. Cooper has presented no evidence establishing the Debtor agreed to pay fees to Cooper, that the contingency fee of the Retainer Letter was to be shared amongst the attorneys, or that the Debtor consented to any contingency fee being split amongst the attorneys. Cooper does not hold a attorney's lien for fees against the Funds. It appears from the papers submitted by Cooper that Cooper did provide some substantive legal services for the benefit of the Debtor. It is equitable to split the contingency fee of \$9,999.99 evenly between Cooper and Sherman. Cooper is entitled to a general unsecured nonpriority claim in the amount of \$15,710.92 (costs of \$10,710.93 plus fees of \$4,999.99). Sherman is entitled to a general unsecured nonpriority claim in the amount of \$12,243.26 (costs of \$7,243.25 plus fees of \$5,000.01).

Anderson asserts entitlement to payment of \$6,000.00 for attorney's fees for twenty-four hours of work billed at \$250.00 per hour. He did not file a proof of claim. He was apparently engaged by Cooper as North Carolina local counsel to handle the selection of a jury. Neither Cooper nor Sherman executed a formal engagement agreement with Anderson. Sherman disputes Anderson's claim deeming it "exorbitant."¹⁰ No evidence has been presented establishing Anderson and the Debtor executed a formal engagement agreement or that the Debtor consented to his employment or billing structure. No evidence has been presented establishing the basis of Anderson's billing rate and the specific services provided by him. Anderson's billing rate of \$250.00 is not reasonable and his fee request is contrary to the terms of the Engagement Agreement, which is a contingency fee agreement only. Any claim by Anderson, or asserted on his behalf, for fees is disallowed.

Rogerson provided no substantive legal representation in the personal injury litigation and apparently seeks a 5% referral fee. No evidence has been presented establishing the Debtor agreed to a referral fee for Rogerson, a referral fee is allowed by any applicable laws or rules of professional conduct, or the basis for such referral fee. Rogerson has

⁶ Claim No. 5 at p. 1.

⁷ Id. at Rider to Transfer and Conveyance of Proceeds and Security Agreement.

⁸ Claim No. 4 attachment.

⁹ The cost portion of the claim contains an amount of \$3,500.00 paid to "Carmella Crosen" by check number 1616 on January 17, 2003. Sherman has presented no evidence establishing the purpose of this payment and whether such payment was allowable pursuant to the applicable rules governing attorney-client relationships.

¹⁰ Doc. No. 27 at p. 2.

neither entered an appearance in this case nor filed a proof of claim. Any claim by Rogerson, or asserted on his behalf, for a referral fee is disallowed.

CONCLUSIONS OF LAW

The Funds constitute property of the bankruptcy estate pursuant to 11 U.S.C. § 541 and are not exempt. All services performed and costs incurred by Sherman, Cooper, Anderson, and Rogerson in relation to the Debtor's personal injury litigation arose prepetition. The Fidelity loan transaction took place prepetition. None of the creditors' claims constitute administrative expenses pursuant to 11 U.S.C. § 503(b) and are not entitled to priority status pursuant to § 507(a). The Debtor entered into a contingency fee agreement with Sherman and no other attorneys in regards to her personal injury litigation.

Cooper asserts it is entitled to a secured claim of \$17,954.18 pursuant to Code of Virginia § 54.1-3932. Section 54.1-3932(A) provides:

Any person having or claiming a right of action sounding in tort, or for liquidated or unliquidated damages on contract or for a cause of action for annulment or divorce, may contract with any attorney to prosecute the same, and the attorney shall have a lien upon the cause of action as security for his fees for any services rendered in relation to the cause of action or claim. . . .

VA. CODE ANN. § 54.1-3932(A) (2006). No contract exists between Cooper and the Debtor pursuant to which the Debtor engaged Cooper to prosecute her automobile injury case.¹¹ The requirements of § 54.1-3932(A) have not been met and Cooper is not entitled to a lien for attorney's fees pursuant to Virginia state law. Cooper's proof of claim appears to only address costs advanced. The Virginia statute allows a lien for "fees for any services rendered in relation to the cause of action or claim" and does not allow a lien for costs advanced. Claim No. 4 is not entitled to secured status. The Trustee's objection to the secured status of Claim No. 4 is proper and shall be sustained.

¹¹ The Signature Authorization, and other documents, provided by Cooper as exhibits to Doc. No. 36 do not constitute a contract in conformity with § 54.1-3932. The Signature Authorization grants Cooper the limited authority to sign and deposit a settlement check.

Sherman is entitled to a contingency fee of 33 1/3% of \$30,000.00 based upon the Engagement Letter. It would be inequitable to award the entire contingency fee to Sherman because both Sherman and Cooper performed substantive legal services for the benefit of the Debtor. An equitable split of the contingency fee is proper pursuant to 11 U.S.C. § 105(a). The amount of \$9,999.99 shall be evenly split between Cooper and Sherman. Cooper shall have an allowed general unsecured claim in the amount of \$15,710.92 (costs of \$10,710.93 plus fees of \$4,999.99). Sherman shall have an allowed general unsecured claim in the amount of \$12,243.26 (costs of \$7,243.25 plus fees of \$5,000.01).

Fidelity asserts in its claim, Claim No. 5, it is entitled to a lien on the Funds. It has not established it properly perfected its alleged security interest in the Funds. The Trustee's objection to the secured status of Claim No. 5 is proper and shall be sustained. Fidelity holds a general unsecured claim in the allowed amount of \$7,180.00.

Wilson Memorial Hospital holds an allowed general unsecured claim in the amount of \$546.00 (Claim No. 2). Winchester Medical Center holds an allowed general unsecured claim in the amount of \$3,255.20 (Claim No. 3). The Trustee has not objected to these claims. No basis exists for paying sums to Anderson or Rogerson. Any claims asserted by or for the benefit of Anderson and Rogerson are disallowed. The creditors' allowed general unsecured nonpriority claims are entitled to payment on a pro rata basis pursuant to 11 U.S.C. § 726(a).

Accordingly, it is

ORDERED, ADJUDGED and DECREED that the Trustee's objections to Claim Numbers 4 and 5 are sustained; and it is further

ORDERED, ADJUDGED and DECREED that the following general unsecured nonpriority claims are allowed and shall be paid on a pro rata basis pursuant to 11 U.S.C. § 726(a): (i) Lawrence E. Sherman, Jr. with the Sherman Law Firm in the amount of \$12,243.26; (ii) John M. Cooper with the Law Offices of Hajek, Shapiro, Cooper & Lewis, P.C. in the amount of \$15,710.92; (iii) Fidelity Settlement Funding, LLC in the amount of \$7,180.00; (iv) Wilson Memorial Hospital in the amount of \$546.00; and (v) Winchester Medical Center in the amount of \$3,255.20; and it is further

**ORDERED, ADJUDGED and
DECREED** that any claims asserted by or for the
benefit of Anderson and Rogerson are disallowed.

Dated this 3rd day of May, 2006.

/s/ Arthur B. Briskman
ARTHUR B. BRISKMAN
United States Bankruptcy Judge