

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re:

NATURALLY BEAUTIFUL NAILS,
INC.,

Case No. 95-321-8P1

Debtor. _____/

**ORDER ON GRAYROBINSON, P.A.'S
MOTION TO ENFORCE CHARGING LIEN AND
TO AUTHORIZE PAYMENT OF SECURED CLAIM
(Doc. No. 528)**

The Motion under consideration filed by GrayRobinson, P.A. (Law Firm) is presented in an unorthodox setting. This case is now a Chapter 7 case converted from a Chapter 11 case after the Joint Plan of Reorganization of Naturally Beautiful Nails and Nail Masters, Inc. (Debtors) had been confirmed. The facts relevant to the Motion under consideration are without dispute and can be summarized as follows.

In January 2000, several months after the Order of Confirmation was entered, the Debtors retained the Law Firm as special counsel to represent the Debtors in an adversary proceeding filed by the Debtors against Wal-Mart Stores Incorporated (Wal-Mart).

According to the Retainer Agreement (Agreement), the Debtors agreed to pay the Law Firm one-half (1/2) of the Law Firm's standard hourly rate, plus a 25% contingency fee from the gross recovery of the Wal-Mart litigation. The Debtors agreed to pay the Law Firm periodically the fee earned during the period at the rate stipulated in the Agreement, plus the costs incurred by the Law Firm. On April 24, 2000, the Debtor paid the Law Firm the sum of \$17,500.00 as a retainer.

In late August of 2000, the law firm of Shackelford, Farris, Stallings & Evans began discussions with the Law Firm about a possibility of merging the two law firms. An agreement was reached and in September 2000, was consummated. Because the Law Firm has represented Wal-Mart, the merger created a conflict of interest according to Rule 4-1.16(a)(1) of the Rules Regulating the Florida Bar. The Law Firm had to withdraw from its representation of the Debtors unless Wal-Mart consented to the continued representation of the Debtors by the Law Firm. Wal-Mart refused to consent and in fact filed a Motion to Disqualify the Law Firm. Before the Motion was heard and acted on, the Law Firm withdrew voluntarily, rendering the Motion of Wal-Mart moot, which was denied by an entry of an order on December 1, 2000.

During the period the Law Firm represented the Debtors, it claims to have earned forty four thousand, nine hundred, seventy-five and 25/100ths dollars (\$44,975.25). In addition to the original retainer of \$17,500, the Law Firm received \$23,790.47 or a total of \$41,290.47, for representing the Debtors during an 11-month period leaving a claimed balance of \$21,184.78.

It is unclear whether the Law Firm used the assertion of its claim of a retaining lien on the Debtors' records including the documents vital to the pending litigation as leverage or whether the Debtors voluntarily agreed to the modification of the original fee agreement. Nonetheless, the Debtors entered into a modified fee agreement with the Law Firm. On January 25, 2001, the Debtors and the Law Firm entered into a written contract pursuant to which the Debtors agreed to pay \$40,000, to the Law Firm from the recovery of the Wal-Mart litigation.

Contrary to the contention of the Law Firm that this Court's Findings of Fact and Conclusions of law and its recommendation for the entry of a judgment in favor of the Debtors in the amount of one million, forty five thousand, two hundred, forty six dollars and 36/100ths was based "exclusively on the testimony on Ms. Chesemore" is not borne out by the record. This claim is based on the proposition urged by the Law Firm that the Law Firm was

instrumental to secure the testimony of Ms. Chesemore without which there would not have been any recovery in the Wal-Mart litigation and the punitive damage award in the amount of \$500,000 was based on the Amended Complaint filed by the Law Firm.

Although the Law Firm ceased to represent the Debtors on November 29, 2000, it claims an additional sum of in excess of \$8,000.00 for services relating to the collection of its fees and costs.

In opposition to the Motion, the Trustee of the Chapter 7 estate of the Debtors contends that under the applicable laws of the State of Florida, an attorney who is retained on a contingency fee agreement is not entitled to compensation for services rendered after the attorney voluntarily withdraws in the absence of any evidence that the client breached the attorney's contract or legally caused to be breached or placed the attorney in an ethical dilemma, citing Faro v. Romani, 641 So.2d 69 (Fla. 1994). In support of its conclusion, the Supreme Court cited the case of The Florida Bar v. Hollander, 607 S.2d 412 (Fla. 1992) that any contingency fee contract which permits the attorney to withdraw from representation without fault on the part of the client or for other just reason, and purports to allow the attorney to collect a fee for services

already rendered would be unenforceable and unethical. *See also* Smith v Parker, 508 S.2d 1262 (Fla. 5th DCA 1987).

It cannot be argued in good faith that the Law Firm did not voluntarily withdrew from its representation of the Debtor and the cause for the withdrawal was its own doing and was not caused by a breach of the contract by the Debtor. From this it follows that under the controlling authorities discussed above, the Law Firm is not entitled to any fees. Thus, it has no enforceable charging lien on the Wal-Mart recovery.

The Law Firm, in order to escape the impact of the overwhelming holdings of the cases cited, contends that they are not controlling and applicable because the Agreement was not a pure contingency fee agreement because it had a fixed hourly fee component, in addition to the contingency fee provision. This Court is constrained to reject this argument and is satisfied that the original Agreement was fatally tainted by the contingency fee provision.

This leads to the next proposition urged by the Law Firm in support of its claim to assert a charging lien, which is that the original Agreement was modified and superceded by the fee agreement entered into by the parties on January 25, 2001, months after the Law Firm already withdrew and the modified fee agreement is based on a fixed sum and has no contingency provision. While

it is true that facially this is not a contingency fee contract, thus not controlled by Faro and the other authorities, this proposition does not bear a close analysis. First, the modified fee agreement was clearly entered at the insistence of the Law Firm that it could not recover its fees under the original Agreement who without doubt, used its claim of retention lien as leverage. And, second the modified fee agreement expressly provides that the fees of the Law Firm would be paid from the recovery from the Wal-Mart litigation.

In sum, this Court is satisfied that the Law Firm is not entitled to any compensation for the services it rendered in connection with the Wal-Mart litigation. Accordingly, it has no enforceable charging lien on the recovery for its attorneys' fees. However, the Law Firm argues that it has a valid charging lien for its costs.

In support of this alternative, the Law Firm cites to the case of Mary Kay v. Home Depot, Inc., 623 So.2d 764 (Fla. 5th DCA 1993). In this case, which is a valid authority for the proposition that the charging lien also extends to the cost incurred by the attorney and is not limited to the fees, the facts are different in that it did not involve a case where the attorney forfeited the right to a charging lien like in the instant situation.

Notwithstanding, this Court is satisfied that under the powers granted to this Court by Section 105 of the Code based on the general principles of equity and fairness, this Court does recognize that the Law Firm's charging lien should extend to the costs it incurred on the recovery from the Wal-Mart litigation.

Accordingly it is

ORDERED, ADJUDGED AND DECREED that GrayRobinson, P.A.'s Motion to Enforce Charging Lien and To Authorize Payment of Secured Claim be, and the same is hereby, denied as to the attorneys' fees but granted as to the cost of the Law Firm in the amount of \$8,287.78, unless the Chapter 7 Trustee files an objection as to the amount claimed within ten (10) days from the date of the entry of this Order.

DONE AND ORDERED at Tampa, Florida, on October 13, 2004

/s/ Alexander L. Paskay
ALEXANDER L. PASKAY
U.S. Bankruptcy Judge