

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

In re:

Case No. 8:05-bk-15172-PMG
Chapter 7

YATE K. CUTLIFF,

Debtor.

ANGELA WELCH ESPOSITO,
Chapter 7 Trustee,

Plaintiff,

vs.

Adv. No. 8:05-ap-823-PMG

YATE K. CUTLIFF,
STEPHAN A. PENDORF, as managing
Partner of Pendorf & Cutliff, and
PENDORF & CUTLIFF, Attorneys at Law,

Defendants.

**ORDER ON PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT
AS TO STEPHAN A. PENDORF**

THIS CASE came before the Court for hearing to consider the Motion for Summary Judgment as to Stephan A. Pendorf. The Motion was filed by the Plaintiff, Angela Welch Esposito, as Chapter 7 Trustee.

The Trustee commenced this adversary proceeding by filing a Complaint for Declaratory Judgment, Turnover of Property and Injunction. In the Complaint, the Trustee alleges that the Debtor, Yate K. Cutliff, previously was a member of the law firm of Pendorf & Cutliff, that Pendorf & Cutliff owed certain receivables to the Debtor as of the date of the bankruptcy petition, and

that the Defendant, Stephan A. Pendorf, as managing member of Pendorf & Cutliff, should be required to turn over the receivables to the bankruptcy estate.

The Trustee subsequently filed a Motion for Summary Judgment, and asserts that there is no genuine issue as to any material fact, and that she is entitled to a judgment against Stephan A. Pendorf as a matter of law.

Background

The Debtor filed a petition under Chapter 7 of the Bankruptcy Code on August 1, 2005. The Debtor is a licensed attorney.

Prior to the filing of the bankruptcy petition, the Debtor practiced law with a law firm known as "Pendorf & Cutliff, Attorneys at Law." It appears that Pendorf & Cutliff's primary area of practice involved patent and trademark law.

According to the Debtor, her agreement with Stephan A. Pendorf (Pendorf) provided that she would receive 60 percent of the receivables collected by the law firm on account of legal services performed by her. Also according to the Debtor, Pendorf & Cutliff owed her the sum of \$26,799.44 as of the petition date. The Debtor asserts that the sum represents "the 60% aggregate amount earned by me and collected by Stephan A. Pendorf from various clients." (Doc. 23, Exhibit A, Affidavit of Yate K. Cutliff).

On November 3, 2005, the Trustee filed the Complaint that commenced this adversary proceeding. Count I of the Complaint is an action for a declaratory judgment to determine that the receivables owed by Pendorf & Cutliff are property of the estate. Count II of the Complaint is an action for turnover of the receivables to the Trustee. In Count I and Count II, the Trustee seeks the entry of a judgment against the Debtor, Pendorf, and Pendorf & Cutliff.

The Trustee subsequently filed a Motion for Summary Judgment as to Count I and Count II of the Complaint. In the Motion, the Trustee contends that since Pendorf "is/was the controlling party of Pendorf & Cutliff, he is the proper party to make payments or disbursements on behalf of Pendorf & Cutliff including the amount of \$26,799.44 that is property of the bankruptcy estate." (Doc. 23, p. 3). Consequently, the

Trustee seeks the entry of a summary judgment "against Stephan A. Pendorf, as managing partner of Pendorf & Cutliff," as to Count I and Count II of the Complaint.

Pendorf filed several written Responses to the Trustee's Motion for Summary Judgment. (Docs. 28, 32, 33). In his Responses, Pendorf asserts that the Motion should be denied for three primary reasons.

First, Pendorf asserts that the Debtor's employment agreement was with an entity known as Stephan A. Pendorf, P.A., a Florida corporation, and that he is therefore not personally liable for any amounts owed to the estate. Second, he disputes the amount claimed by the estate, because he contends that the Debtor owes the law firm approximately \$17,000.00 that she had agreed to pay as reimbursement to the firm for certain filing fees or application fees that it had advanced. Third, he asserts that the law firm is not in possession of the receivables because they had been embezzled by the firm's former bookkeeper.

Discussion

Rule 56(c) of the Federal Rules of Civil Procedure, as made applicable to this proceeding by Rule 7056 of the Federal Rules of Bankruptcy Procedure, provides that a summary judgment may be granted if "there is no genuine issue as to any material fact" and the "moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

The moving party has the burden of establishing the right to summary judgment. *Fitzpatrick v. Schiltz (In re Schiltz)*, 97 B.R. 671, 672 (Bankr. N.D. Ga. 1986). In determining entitlement to summary judgment, a court must view all evidence and make all reasonable inferences in favor of the party opposing the motion. *Haves v. City of Miami*, 52 F.3d 918, 921 (11th Cir. 1995)(citing *Dibrell Bros. Int'l S.A. v. Banca Nazionale Del Lavoro*, 38 F.3d 1571, 1578 (11th Cir. 1994)). Therefore, a material factual dispute precludes summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

In re Transit Group, Inc., 332 B.R. 45, 51 (Bankr. M.D. Fla. 2005)(Emphasis supplied). "A fact is material if it would affect the determination of the underlying action." *In re Scanlon*, 242 B.R. 533, 535 (Bankr. S.D. Fla. 1999)(citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

In this case, the Court finds that genuine issues of material fact are present that preclude the entry of a summary judgment.

First, an issue of fact exists regarding the type of business form used by the Debtor and Pendorf in the conduct of their legal practice. The Trustee's Complaint, for example, names "Pendorf & Cutliff, Attorneys at Law" as a defendant. (Doc. 1). Further, in her affidavit in support of the Trustee's Motion for Summary Judgment, the Debtor states that "I formerly practiced law with Stephan A. Pendorf under the name of Pendorf & Cutliff." (Doc. 23, Exhibit A, ¶ 3).

In his Responses to the Motion for Summary Judgment, however, Pendorf asserts that "'Pendorf & Cutliff, Attorneys at Law' is a d/b/a for the joint venture of Stephan A. Pendorf, P.A. and Yate K. Cutliff, P.A., both at the time Florida Corporations." (Doc. 32, ¶ 6, Doc. 33, ¶ 14). According to Pendorf, "Stephan A. Pendorf, P.A." had been formed as a Florida corporation in 1994. (Doc. 32, ¶ 2, Exhibit A). Pendorf further contends that Stephan A. Pendorf, P.A. maintained its separate corporate existence while it operated in the joint venture with the Debtor. (Doc. 32, ¶¶ 9-28).

In her Motion for Summary Judgment, the Trustee is seeking a judgment against Pendorf, individually, "as managing partner of Pendorf & Cutliff." (Doc. 23, p. 3). Clearly, the business form used by the Debtor and Pendorf affects Pendorf's personal liability for the debts of the entity known as "Pendorf & Cutliff, Attorneys at Law." The conflicting statements by the Debtor and Pendorf have not been reconciled in the record. Consequently, the entry of a summary judgment at this time is not appropriate.

Second, an issue of fact exists regarding the specific terms of the business agreement between the Debtor and Pendorf. In her Affidavit, the Debtor states that the "compensation agreement between Stephan A. Pendorf and myself provides that I receive 60% of receivables

collected by the firm from clients of which I performed legal services on behalf of." (Doc. 23, Exhibit A, ¶ 4).

In his Responses, however, Pendorf stated that it "was further agreed that any operating funds advanced to pay trademark application filing fees, patent application filing fees, PCT application filing fees, foreign associate invoices for foreign filed patent and trademark applications, etc., would have to be repaid by the working attorney." (Doc. 28, ¶ 2). According to Pendorf, the Debtor owes Pendorf & Cutliff the sum of \$17,475.33 as reimbursement for expenses paid by the firm, which should be set off against the amount claimed by the estate. (Doc. 32, ¶¶ 29-31; Doc. 33, ¶¶ 47-50).

No written business agreement between the Debtor and Pendorf appears in the record, and the parties have not expressly indicated whether any such written agreement was signed. In the event that the agreement was an oral agreement, the parties appear to differ as to the manner in which the Debtor's compensation was to be calculated. In either case, the entry of a summary judgment requiring the turnover of a specific sum to the Trustee is not appropriate at this time.

Conclusion

The Trustee commenced this action by filing a Complaint for Declaratory Judgment and Turnover, among other relief. The action relates to certain fees that had been earned by the Debtor in connection with legal services that she had performed during her association with Pendorf & Cutliff, Attorneys at Law.

In her Motion for Summary Judgment, the Trustee seeks the entry of a judgment requiring turnover of the receivables from "Stephan A. Pendorf, as managing partner of Pendorf & Cutliff."

The Court finds that issues of fact exist in this case that preclude the entry of a summary judgment at this time. The issues of fact involve the type of business form used by the Debtor and Pendorf in the conduct of their legal practice, and the specific terms of the business agreement that had been entered by the Debtor and Pendorf. The Trustee's Motion should be denied.

Accordingly:

IT IS ORDERED that the Plaintiff's Motion for Summary Judgment as to Stephan A. Pendorf is denied.

DATED this 1st day of August, 2007.

BY THE COURT

/s/ Paul M. Glenn
PAUL M. GLENN
Chief Bankruptcy Judge