UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

CHARLES R. WILLIAMSON, **CASE NO. 06-00430-NPO**

DEBTOR. **CHAPTER 7**

MEMORANDUM OPINION AND ORDER GRANTING
TRUSTEE'S MOTIONS FOR APPROVAL OF COMPROMISE AND SETTLEMENT

On September 24, 2007, there came on for hearing (the "Hearing"): a) the Motion for Approval of Compromise and Settlement as to the following defendants: Central Mississippi Medical Center, Robert Lee, M.D., and Stephen Burney, M.D. (the "First Motion to Approve Settlement") (Dk. No. 72), and the Motion for Approval of Compromise and Settlement as to the following defendants: Diomed, Inc., Axcan Scandipharm, Inc., Laserscope, Inc., QLT, Inc., and Robert "Bob" Conn d/b/a South Central Imaging, Inc. (the "Second Motion to Approve Settlement") (Dk. No. 84) (collectively, the "Trustee's Settlement Motions"), both of which were filed by the chapter 7 trustee, J. Stephen Smith (the "Trustee"); and b) the Debtor's Objection to Trustee's Motion for Compromise and Settlement ("Debtor's First Objection") (Dk. No. 76), and the Debtor's Objection to Motion for Approval of Compromise and Settlement ("Debtor's Second Objection") (Dk. No. 89) (collectively, the "Debtor's Settlement Objections"), filed by Charles R. Williamson (the "Debtor"). In this proceeding, Eileen Shaffer represented the Trustee, and Thandi Wade and Joe Tatum represented the Debtor. At the Hearing, the Court requested that the parties submit simultaneous legal memoranda supporting their arguments by October 4, 2007. The Trustee submitted his memorandum timely ("Trustee's Memorandum") (Dk. No. 94). The Debtor filed his

Memorandum in Opposition to Settlement out of time[1] (Dk. No. 96). The Court, having considered the testimony and evidence presented at the Hearing[2] together with the legal memorandum filed by the Trustee, concludes for the following reasons that the Trustee's Settlement Motions are well taken and should be granted.

Jurisdiction

This Court has jurisdiction over the parties and the subject matter of this proceeding pursuant to 28 U.S.C. § 1334. This is a core proceeding under 28 U.S.C. § 157 (b)(2)(A). Notice of the Trustee's Settlement Motions and Debtor's Settlement Objections was proper under the circumstances.

Facts

1. On or about December 8, 2002, the Debtor filed a lawsuit styled Charles Ray "C.R." Williamson vs. Central Mississippi Medical Center, Robert Lee, M.D. and Stephen Burney, M.D., Diomed, Inc., Robert "Bob" Conn d/b/a South Central Imaging, Inc., QLT, Inc., Laserscope, Inc.,

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[1] The Debtor failed to provide the Court with any legal authority to support his arguments at the Hearing. Debtor's legal memorandum (Dk. No. 96) will not be considered by the Court because it was untimely filed and because Exhibit "A" to Debtor's memorandum consists of a typewritten, unsigned statement which was not admitted into evidence and addresses matters outside the record. See In re Associated Painting Services, Inc., 1993 WL 179423 at *8 n.21 (E.D. La.) ("[O]ur adversary system imposes on the parties the burden of presenting evidence at the trial. . . so that it is officially introduced and thereupon can be considered by the trier of fact in the resolution of fact issues." McCormick on Evidence, V.1, Ch. 6 at 194 (4th ed. 1989). "The fact issues at the trial should be decided upon the facts 'in the record,' i.e., facts officially introduced in accordance with the rules of practice, and facts which the court may judicially notice." Id. at 194 n.1).

[2] The Debtor attempted to supplement his testimony after the Hearing by filing a seven page, typewritten statement on October 10, 2007 (Dk. No. 99). The Court will not consider this submission as it was filed untimely, was not filed by the attorney of record, and addresses matters outside the record. See *supra*, n.1.

Axcan Scandipharm, Inc.; In the Circuit Court of the First Judicial District of Hinds County, Mississippi; Civil Action No. 251-02-1599 (the "Lawsuit"). The Lawsuit arose out of a burn injury the Debtor allegedly received during a medical procedure in which a laser apparatus was used to treat lesions on his lung (Hr'g Tr. at 9-10).

2. On March 24, 2006, the Debtor filed a voluntary petition (the "Petition") (Dk. No. 1) pursuant to chapter 7 of the Bankruptcy Code (the "Chapter 7 Case").

3. The Debtor disclosed the Lawsuit on his Schedule B as a "contingent and unliquidated claim" (Dk. No. 3).

4. On July 21, 2006, the Court entered an Order Discharging the Debtor (Dk. No. 25).

5. On August 28, 2006, the Trustee filed an Application to Employ Michael V. Ward, Ferr Smith and Edward Blackmon, Jr. as Attorneys for Special Purpose (the "First Application to Employ") (Dk. No. 31) to pursue the Lawsuit.[3]

6. On September 7, 2006, the Debtor filed the Objection to First Application to Employ (the "Debtor's Objection to Employ") (Dk. No. 34) which was not signed by Debtor's counsel.[4] In the Debtor's Objection to Employ, the Debtor stated that he was considering filing a complaint against Ward and Smith which "will detail. . . misrepresentations, unnecessary delays and lack of

[3] Hereinafter, these attorneys will be referred to as follows: Michael V. Ward ("Ward"), Ferr Smith ("Smith"), and Edward Blackmon, Jr. ("Blackmon").

[4] The Trustee filed a Motion to Strike Objection (Dk. No. 40) on November 20, 2006, because the pleading was not signed by Debtor's counsel. Counsel for Debtor filed the Answer to Trustee Motion to Strike (Dk. No. 43) on November 28, 2006. Counsel for Debtor filed Debtor's Amended Objection to Application to Employ Michael V. Ward and Ferr Smith As Attorney's for Special Purpose (Dk. No. 54) on January 4, 2007, in which he incorporated the Debtor's original objection by reference. On January 29, 2007, the Court entered the Order Withdrawing Trustee's Motion to Strike Objection (Dk. No. 62).

progress, breach of contract and general unethical conduct on the part of Smith and Ward." Id. The Debtor also stated that he was "prepared to document these allegations against Smith and Ward to the bankruptcy court." Id. The Court set the matter for hearing.

7. On November 7, 2006, the Court held a hearing on the Application to Employ and the Debtor's Objection to Employ. After hearing testimony by the Trustee, the Court asked the United States Trustee (the "UST") and the Trustee to investigate the Debtor's allegations regarding alleged conflicts and improper conduct on behalf of Ward and Smith, and to submit reports to the Court by November 22, 2006, detailing the findings of their investigations. The Court then held the proceedings in recess until December 5, 2006.

8. On November 20, 2006, the UST filed his Response to Court's Request for Additional Information Concerning Debtor's Objection to Employ Michael V. Ward, Ferr Smith and Edward Blackmon, Jr., as Attorneys For Special Purpose (the "UST's Response") (Dk. No. 41). In the UST's Response, the UST outlined that he requested "any and all information evidencing improper conduct" by the proposed attorneys from the Debtor's counsel, but had received no responsive documentation or evidence. Id.

9. On November 21, 2006, counsel for the Trustee filed the Trustee's Report (the "Trustee's Report") (Dk. No. 42) indicating that the Trustee had discussed the allegations with both Ward and Smith and was unaware of any basis for the Debtor's Objection to Employ. The Trustee's Report also stated that he had been "unable to obtain any definitive example, or basis from the Debtor as to the allegations set forth in his Objection." Id.

10. After granting two continuances, the Court held a hearing on January 23, 2007. After hearing testimony by the Debtor, the Court granted the Trustee's Application to Employ with

Blackmon to serve as lead counsel. The Order Granting Application to Employ (the "First Order Granting Application to Employ") was entered by the Court on January 29, 2007 (Dk. No. 63), and no appeal was taken.

11. On April 25, 2007, the Trustee filed his Application to Employ David L. Merideth[5] as Attorney for Special Purpose (Dk. No. 66) (the "Second Application to Employ"). The Debtor filed no objection. On May 17, 2007, the Court entered the Order Granting the Second Application to Employ ("Second Order Granting Application to Employ") (Dk. No. 70).

12. On May 30, 2007, the Trustee filed the First Motion to Approve Settlement (Dk. No. 72). On June 4, 2007, the Debtor filed a letter of objection to the Motion for Approval of Compromise and Settlement, which was not signed by Debtor's counsel. (Dk. No. 74). On June 28, 2007, counsel for Debtor filed the Debtor's First Objection (Dk. No. 76) which incorporated Debtor's letter of objection by reference.

13. On August 28, 2007, the Trustee filed the Second Motion to Approve Settlement (Dk. No. 84). On September 12, 2007, the Debtor filed the Debtor's Second Objection (Dk. No. 89)

14. The Court conducted a Hearing on the Trustee's Settlement Motions and the Debtor's Settlement Objections. Blackmon testified that both proposed settlements were fair and in the best interest of the bankruptcy estate (Hr'g Tr. at 12-15, 59-61).

15. The Debtor testified that he objected to the Trustee's Settlement Motions for the following reasons:

a. "The previous attorney that was hired in 2002 misled, lied, and concealed information [from the Debtor in the Lawsuit]" (Hr'g Tr. at 25);

[5] Hereinafter referred to as "Merideth." Merideth is both a lawyer and a physician.

b. The hospital and doctors committed negligence, concealed evidence pertaining to the fire, and released the equipment back to the manufacturer (Hr'g Tr. at 28);

c. The Debtor "did not have legal representation during the mediation" (the "Mediations") of the Lawsuit (Hr'g Tr. at 28-29);

d. The case was "shoved all over the State of Mississippi to several other law firms when [the Debtor] was told that the lawyer that was involved in [the] case had the resource and technology to handle it" (Hr'g Tr. at 29);

e. One of the attorneys told the Debtor that "it would not be good for the attorneys to depose a physician" (Hr'g Tr. at 29);

f. The doctors used the drug and fiber optic knowing it was out of date (Hr'g Tr. at 29);

g. The amount of the settlements would not cover the punitive damages to which the Debtor thought he was entitled (Hr'g Tr. at 31); and

h. The amount of the settlements would not cover his long-term medical expenses (Hr'g Tr. at 67).

Issues

The issues before the Court are:

1. Whether the Debtor can object to the settlements on the basis that he disagreed with the Trustee's hiring of Ward and Smith as Trustee's attorneys for special purpose to pursue the Lawsuit;

2. Whether the Debtor was entitled to have independent counsel compensated from the

bankruptcy estate during the Mediations; and

3. Whether the proposed settlements comply with the standards for approving compromises and settlements.

Discussion

1. Disagreement with Choice of Ward and Smith as Trustee's Attorneys for Special Purpose.

At the Hearing, the Trustee objected to the Debtor's testimony about his disagreement with the Trustee's employment of Ward and Smith for special purpose to pursue the Lawsuit as a reason for objecting to the Trustee's Settlement Motions because "there have been orders entered by the Court approving their employment." (Hr'g Tr. at 26). The Court agrees and finds that the Debtor cannot base his objections to the settlements on the employment of Ward and Smith as Trustee's attorneys for special purpose due to the doctrine of *res judicata*.

The Fifth Circuit has applied the traditional test for *res judicata* in the bankruptcy context. *See* Bank of Lafayette v. Baudoin (In re Baudoin), 981 F.2d 736, 739 (5th Cir. 1993). "Any attempt by the parties to relitigate any of the matters that were raised *or could have been raised* therein is barred under the doctrine of *res judicata*." Id. (emphasis in original) (quoting Matter of Brady, 936 F.2d 212, 215 (5th Cir.), cert. denied, 502 U.S. 1013, 112 S.Ct. 657, 116 L.Ed.2d 748 (1991)). "Thus, a bankruptcy judgment bars a subsequent suit if: 1) both cases involve the same parties; 2) the prior judgment was rendered by a court of competent jurisdiction; 3) the prior decision was a final judgment on the merits; and 4) the same cause of action is at issue in both cases." Id. at 740 (citing Latham v. Wells Fargo Bank, N.A., 896 F.2d 979, 983 (5th Cir. 1990)).

The Court finds that the first and second factors required for the application of *res judicata* are present. That is, the parties involved in the Hearing on the Trustee's Settlement Motions and

Debtor's Settlement Objections are the same parties that were involved in the hearing on the Trustee's Application to Employ and the Debtor's Objection to Employ. Moreover, the First Order Granting Application to Employ was entered by this Court, a court of competent jurisdiction.

The Court also finds that the third factor required for the application of *res judicata* is present. Although "[t]he Fifth Circuit has not articulated an exact standard for determining when an order by the court in a bankruptcy proceeding constitutes a final judgment on the merits," it has stated that "for purposes of determining the finality of a bankruptcy order, each matter that arises between the filing of the bankruptcy petition and the issuing of a closing order is treated as a separate proceeding." Industrial Clearinghouse, Inc. v. Mims (In re Coastal Plains, Inc.), 338 B.R. 703, 712-13 (5th Cir. 2006). Consequently, a "'final' order in a bankruptcy case can be any order that 'ends a discrete judicial unit in the larger case.'" Id. (quoting Smith v. Revie (In re Moody), 817 F.2d 365, 368 (5th Cir. 1987)). In the instant case, the Court held a hearing on the merits of the Trustee's employment of Ward and Smith on January 23, 2007, in which the Debtor testified. After considering the pleadings and testimony, the Court entered the First Order Granting the Application to Employ (Dk. No. 63). That Order was a final judgment on the merits of the Trustee's employment of Ward and Smith as well as Blackmon.

The Court finds that the fourth factor required for the application of *res judicata* is present as well. The Debtor has objected to the settlements, in part, because he had previously objected to the employment of Ward and Smith to assist the Trustee with the Lawsuit. The Debtor, therefore, has raised his objection to the employment of Ward and Smith in both the hearing on employment and the hearing on the settlements.

Based on the doctrine of *res judicata*, the Debtor cannot relitigate the issue of the employment of Ward and Smith as attorneys for special purpose as a basis for objecting to the

settlements.[6]

2. Debtor's Claimed Right to Independent, Compensated Counsel During Mediations.

The second issue the Court must address is whether the Debtor was entitled to have independent counsel, compensated from the bankruptcy estate, during the Mediations. Under 11 U.S.C. § 541,[7] "when a debtor files a bankruptcy petition, an estate is created that consists of all the debtor's 'legal or equitable interests. . . in property as of the commencement of the case.'" In re Robinson, 2007 WL 1121857, *9 (Bankr. E.D. Ark 2007) (citing 11 U.S.C. § 541(a) (2006)). Moreover, "[p]roperty of the estate is 'broadly construed and includes causes of action belonging to the debtor at the time the case is commenced.'" Id. (citing Yaquinto v. Segerstrom (In re Segerstrom), 247 F.3d 218, 223 (5th Cir. 2001)). Accordingly, the Lawsuit became property of the estate upon the Debtor's filing of the Petition.

Once a lawsuit becomes the property of the estate, the Trustee has the exclusive authority to prosecute, settle, and release it. Schertz-Cibolo-Universal City, Indep. Sch. Dist. v. Wright (In re Educators Group Health Trust), 25 F.3d 1281, 1284 (5th Cir. 1994) ("If a cause of action belongs to

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[6] The Court also finds that even if the doctrine of *res judicata* did not apply in this instance, the Debtor's objection to the settlements based on the involvement of Ward and Smith is misplaced. In addition to Ward and Smith, Blackmon and Merideth, both well-respected trial attorneys with significant experience in medical malpractice litigation, also participated in the Mediations. At no time did the Debtor object to the Trustee's employment of either Blackmon or Merideth. Additionally, the interests of the Debtor in this instance were aligned with the interests of the Trustee, namely, to maximize the assets of the bankruptcy estate. In fact, the testimony at the Hearing demonstrated that the Trustee's attorneys for special purpose were mindful of the Debtor's interests in the Mediations. Blackmon testified, "[w]e wanted to make sure that we didn't just settle for the claims of the [creditors], but also in recognition that he [the Debtor] was, in fact, the injured party, that he would receive money, too." (Hr'g Tr. at 22).

[7] Hereinafter, all code sections refer to the United States Bankruptcy Code located at Title 11 of the United States Code unless otherwise noted.

the estate, then the trustee has exclusive standing to assert the claim."); Wieburg v. GTE Southwest Inc., 272 F.3d 302, 206 (5th Cir. 2001) ("Because the claims are property of the bankruptcy estate, the Trustee is the real party in interest with exclusive standing to assert them."); Jones v. Harrell, 858 F.2d 667, 669 (11th Cir. 1988) ("A trustee in bankruptcy succeeds to all causes of action held by the debtor at the time the bankruptcy petition is filed" so that "only the trustee had authority to settle and release it."). Furthermore, "[a] corollary to the rule that the trustee succeeds to the debtor's prepetition causes of action is that a debtor no longer has standing to pursue his claims once they become property of the estate upon commencement of the bankruptcy case." In re Robinson, 2007 WL 1121857, *11 (Bankr. E.D. Ark. 2007) (citing Wolfe v. Gilmour Mfg. Co., 143 F.3d 1122, 1126 (8th Cir. 1998)); Griffin v. Beaty (In re Griffin), 330 B.R. 737, 740 (W.D. Ark. 2005) ("This authority [to represent the estate in litigation] is granted to the trustee to the exclusion of the debtor."). This is true even when the Debtor would be entitled to receive the surplus funds after his creditors are paid. Id.

Prior to 1994, § 330(a) authorized a court to "award to a trustee, *to* an examiner, *to* a professional person employed under section 327..., *or to the debtor's attorney*" reasonable compensation for services. 11 U.S.C. § 330(a) (1988 ed.) (emphasis added to highlight text later deleted). In 1994, Congress amended the Bankruptcy Code and altered § 330(a) by deleting "or to the debtor's attorney" from what was § 330(a) and is now § 330(a)(1). Bankruptcy Reform Act of 1994, § 224(b), Pub. L. 103-394 (Oct. 22, 1994). The 1994 amendment to § 330(a) confused the issue of whether and when a debtor's attorney might be entitled to compensation under § 330(a).

Based on its interpretation of § 330(a)(1), the Fifth Circuit held in In re Pro-Snax Distributors, Inc., 157 F.3d 414 (5th Cir. 1998), that debtor's counsel could not be compensated from

the estate for work performed after the appointment of a chapter 11 trustee. Pro-Snax, 157 F.3d at 425. Subsequently, in Lamie v. United States Trustee, 540 U.S. 526 (2004), the U.S. Supreme Court addressed the question of whether a chapter 11 debtor's counsel could be paid from chapter 7 estate funds post-conversion. In Lamie, the Supreme Court adopted the rationale of the Fifth Circuit set forth in Pro-Snax, holding that under the plain language as revised in 1994, "§ 330(a)(1) does not authorize compensation awards to debtors' attorneys from estate funds, unless they are employed as authorized by § 327. If the attorney is to be paid from estate funds under § 330(a)(1) in a Chapter 7 Case, he must be employed by the trustee and approved by the court." Lamie, 540 U.S. at 538-39.

In the case at bar, the Debtor filed the Petition pursuant to chapter 7 on March 24, 2006. At that point, the Lawsuit became the property of the bankruptcy estate. Thus, upon commencing the Chapter 7 Case, the Debtor no longer had standing to pursue, mediate, or settle the Lawsuit. The Trustee, as the real party in interest, applied to the Court to employ attorneys for the special purpose of pursuing the Lawsuit (Dk. No. 31). After a hearing on the matter in which the Debtor testified, the Court entered the First Order Granting Application to Employ Blackmon, Ward, and Smith. The Court entered the Second Order Granting Application to Employ Merideth without objection on May 17, 2007. As a result, Messrs. Blackmon, Ward, Smith, and Merideth pursed the litigation, mediated the claims, and reached proposed settlements with all defendants on behalf of the Trustee. Since these were the only attorneys employed by the Trustee pursuant to § 327 and approved by the bankruptcy court, they are the only attorneys that may be compensated from estate funds for the work related to the Lawsuit, including the Mediations. Lamie, 540 U.S. at 538-539. At no point were Debtor's bankruptcy attorneys employed by the Trustee under § 327; therefore, they could not be compensated from estate funds to represent the Debtor in the Mediations. Id. Thus, there is no

authority for the Debtor's argument that he had a right to independent counsel to represent him in the Mediations and for that counsel to be paid by the estate.

3. Fifth Circuit Standards for Approving Settlements.

Under Federal Rule of Bankruptcy Procedure 9019(a), bankruptcy courts are empowered to approve a compromise and settlement of a lawsuit if the settlement is "fair and equitable and in the best interest of the estate." Official Comm. of Unsecured Creditors v. Cajun Elec. Power Coop, Inc. (In re Cajun Elec.), 119 F.3d 349, 355 (5th Cir. 1997) (internal citation omitted). In deciding whether a settlement is "fair and equitable," a bankruptcy judge must make a well-informed decision "comparing the terms of the compromise with the likely rewards of litigation." Id. at 356 (citing In re Jackson Brewing Co., 624 F.2d 599, 602 (5th Cir. 1980)). The judge must weigh: (1) "[t]he probability of success in the litigation, with due consideration for the uncertainty in fact and law[8]; (2) [t]he complexity and likely duration of the litigation and any attendant expense, inconvenience and delay; (3) [a]ll other factors bearing on the wisdom of the compromise"; (4) "the best interest of the creditors, 'with proper deference to their reasonable views'"; and (5) "the extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion." Id. at 356 (internal citations omitted).

At the Hearing, the Court first considered the First Motion to Approve Settlement. The Trustee offered testimony from Blackmon, the lead attorney for special purpose pursuant to § 327, that the settlement was fair and in the best interest of the estate (Hr'g Tr. at 15). Blackmon further

[8] "With respect to the first factor, it is unnecessary to conduct a mini-trial to determine the probable outcome of any claims waived in the settlement." In re Cajun Elec., 119 F.3d at 356. "The judge need only apprise himself of the relevant facts and law so that he can make an informed and intelligent decision. . . ." Id. (citing La Salle Nat'l Bank v. Holland (In re American Reserve Corp.), 841 F.2d 159, 163 (7th Cir. 1987)).

testified that the settlement was the product of at least three mediations (Hr'g Tr. at 10); the hospital and doctors had limited exposure to liability (Hr'g Tr. at 10); the doctors "did nothing. . .to cause the fire" (Hr'g Tr. at 11); the injury was not permanent (Hr'g Tr. at 11); the probability of success in the litigation was low (Hr'g Tr. at 13); the litigation would be complex, expensive (Hr'g Tr. at 14), and lengthy (Hr'g Tr. at 15); and the actual damages were limited to $38,000 in medical expenses (Hr'g Tr. at 18-19).

Blackmon also offered testimony in support of the Second Motion to Approve Settlement. He adopted and applied the majority of his testimony regarding the First Motion to Approve Settlement to the Second, including his testimony regarding the duration and possibility of success of the litigation (Hr'g Tr. at 59, 61). Blackmon also testified that the amount of settlement proceeds to be paid by the manufacturers and distributors was greater because those defendants had greater exposure (Hr'g Tr. at 60).

The Court finds that the Trustee has shown that the proposed settlements are "fair and equitable and in the best interest of the estate." Cajun Elec., 119 F.3d at 355 (internal citation omitted). Additionally, the Trustee demonstrated that together the proposed settlements would completely satisfy all of the unsecured creditors' claims (Hr'g Tr. at 44). The Debtor, however, failed to present any evidence or testimony to demonstrate that the proposed settlements do not meet the standards set forth by the Fifth Circuit in Cajun Electric. As such, the Court overrules the Debtor's Settlement Objections and grants the Trustee's Settlement Motions.

A separate final judgment consistent with this Memorandum Opinion and Order will be entered by this Court in accordance with Federal Rule of Bankruptcy Procedure 9021.

IT IS, THEREFORE, ORDERED that the Debtor's Settlement Objections are overruled and

the Trustee's Settlement Motions hereby are granted.

SO ORDERED,

Neil P. Olack
United States Bankruptcy Judge
Dated: November 8, 2007