Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: December 4, 2015

The Order of the Court is set forth below. The docket reflects the date entered.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF MISSISSIPPI

IN RE:

WILLIE B. TAYLOR, **CASE NO. 15-11639-NPO**

DEBTOR. **CHAPTER 7**

ORDER OVERRULING OBJECTION AND GRANTING MOTION

This matter came before the Court for hearing on November 19, 2015 (the "Hearing") on the Motion for Authority to Employ Attorney for Trustee *Nunc Pro Tunc* (the "Motion") (Dkt. 29)[1] filed by the chapter 7 trustee, Jeffrey A. Levingston (the "Trustee"), and the Objection to Motion for Authority to Employ Attorney for Trustee *Nunc Pro Tunc* (the "Objection") (Dkt. 42) filed by the debtor, Willie B. Taylor (the "Debtor"). At the Hearing, Cameron Abel ("Abel") represented the Trustee and Joyce Freeland ("Freeland") represented the Debtor. Having considered the matter and being fully advised in the premises, the Court overruled the Objection and granted the Motion on the merits from the bench. The Court reserved ruling on the standing issue raised by the Trustee as an alternative ground for overruling the Objection. This Order memorializes and

[1] Citations to the record are as follows: (1) citations to the docket entries in the above-referenced chapter 7 bankruptcy case (the "Bankruptcy Case") are cited as "(Dkt. ___)"; and (2) citations to docket entries in the related adversary proceeding, No. 15-01088-NPO (the "Adversary") are cited as "(Adv. Dkt. ___)".

supplements the Court's bench ruling.

Jurisdiction

The Court has jurisdiction over the parties to and the subject matter of the Bankruptcy Case pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A). Notice of the Hearing was proper under the circumstances.

Facts

1. The Debtor filed a voluntary petition for relief pursuant to chapter 7 of the Bankruptcy Code on May 6, 2015. (Dkt. 1).

2. The Trustee filed the Motion for Approval of Employment of Counsel ("Motion to Employ") (Dkt. 11) on July 6, 2015, requesting permission to employ Abel as special counsel for the Trustee. In the Motion to Employ, the Trustee stated that he discovered at the § 341[2] meeting of creditors (the "Meeting of Creditors") that the Debtor had conveyed "numerous pieces of real property in Bolivar and Washington Counties" to family members, limited liability companies, and to a family trust "to conceal assets which are property of the bankruptcy estate." (*Id.* at 1). Also in the Motion to Employ, the Trustee argued that he needs Abel's services to "thoroughly investigate these conveyances and the parties to which the conveyances were made. . . ." (*Id.* at 1-2). In the Motion to Employ, the Trustee stated that he sought to employ Abel so that he could object "to the discharge of the Debtor if he determines that such [] action is necessary." (*Id.* at 2).

3. No objection to the Motion to Employ was filed, and the Court entered the Order Authorizing Trustee to Specially Employ Counsel (Dkt. 23) on August 6, 2015.

[2] All code sections refer to the Bankruptcy Code found at title 11 of the U.S. Code, unless stated otherwise.

4. The Trustee filed the Motion on August 25, 2015. In the Motion, the Trustee requested that the Court authorize his employment as attorney for the Trustee retroactively to May 6, 2015. The Trustee argued that he will have to act as an attorney while performing his duties as the chapter 7 panel trustee because "said estate involves certain assets presently located in Bolivar County and Washington County, Mississippi, which must be evaluated, researched and liquidated, and relative to which legal advice will be necessary." (Mot. at 1). The Trustee further argued that it is necessary for him to act as an attorney "in order to conduct an efficient and comprehensive examination in order to locate any other property and assets and determine rights and interest therein." (*Id*.).

5. The Debtor filed the Objection on September 21, 2015. In the Objection, the Debtor maintained that the Trustee did not satisfy his burden of demonstrating that acting as his own attorney is in best interest of the estate pursuant to § 327(d). (Obj. at 1). The Debtor argued that under *In re Interamericas, Ltd.,* 321 B.R. 830 (Bankr. S.D. Tex. 2005), the Court must consider a list of nine (9) factors in determining whether it would be in the best interest of the estate to appoint the Trustee as his own attorney. (*Id.*). The Debtor further reasoned that because the Motion did not address any of these factors or explain why it would be necessary or appropriate to appoint the Trustee as his own attorney, the Court should deny the Motion. (Obj. at 1-2). In the Objection, the Debtor also argued that the Motion may "prove unnecessary and moot, because it may be most efficient for the Debtor to convert the present Chapter 7 case to a Chapter 11 case . . . ." *(Id.* at 2).

6. The Trustee filed the Complaint for Turnover of Property (the "Adversary Complaint") (Adv. Dkt. 1) against the Debtor and others, including the Debtor's children, on

October 19, 2015. The Adversary Complaint provided that the Debtor owns, has ownership interests or rights in, or has transferred thirty-six (36) parcels of real property (the "Real Property") that the Trustee valued at $1,586,525.00 based on available tax assessed values. (*Id.* at 5). In the Adversary Complaint, the Trustee alleged that the Debtor (a) transferred certain parcels of the Real Property to "insiders" for "little or no consideration" less than a year before filing the Bankruptcy Case (*Id.* at 2-3, 8); (b) created the "Willie B. Taylor Family Trust" (the "Family Trust") less than a year before she filed the Bankruptcy Case and conveyed parcels of the Real Property to the Family Trust (*Id.* at 8-9); (c) conveyed parcels of the Real Property to her children while retaining a life estate in the property (*Id.* at 15); (d) transferred parcels of the Real Property to companies that she owned, and that these companies "were operated in such a fashion that their business structures should be disregarded by this Court" (*Id.* at 21-22); and (e) violated the Mississippi Uniform Fraudulent Transfer Act[3] when she transferred a parcel of the Real Property located at 805 Tampa Drive, Greenville, Mississippi 38701 (the "Tampa Drive Property") to her son. (*Id.* at 7, 22). The Trustee claimed that the Debtor was insolvent or became insolvent "shortly after the transfer [of the Tampa Drive Property] was made or incurred . . . ." (*Id.*). The twenty-three (23) page Adversary Complaint contains numerous other allegations that are not recounted here but involve similar misconduct.

7. At the Hearing, Abel withdrew the *nunc pro tunc* portion of the Motion and instead sought approval for the Trustee to act as his own attorney hereinafter. Abel reasoned that the Trustee needs to conduct work outside the scope of his trustee duties because the Bankruptcy Case

[3] The Trustee did not specify any other legal authority in the Adversary Complaint to support his claims for relief.

involves the Real Property, which he claimed is worth $1.5 million. Abel stated that at the Meeting of Creditors, the Debtor testified about potentially fraudulent conveyances. After discovering that the Debtor had transferred property prior to filing the Bankruptcy Case, the Trustee filed the Adversary against the Debtor and others. Abel argued that, in addition to Abel, the Trustee is the best person to serve as his own attorney because he has a working knowledge of the complex details of the Bankruptcy Case, lives near the Real Property and the clerk's office, and has thirty-five (35) years of experience doing similar work. At the Hearing, Abel also suggested for the first time that the Debtor may not have standing to challenge the Motion because she is insolvent and, therefore, does not meet the test for statutory standing.[4]

8. At the Hearing, Freeland argued that the Motion was premature given the current posture of the Bankruptcy Case. Freeland focused on the Adversary, arguing that the Trustee is attempting to go back further than two (2) years to unwind the Debtor's transactions. Freeland argued that it would not be efficient for the Trustee to employ himself because, according to her, no extra work will be required because everything in the Adversary Complaint is in the public record. Freeland also argued that the Motion is moot because the Bankruptcy Case may convert to a chapter 11 case.[5] In response to the Trustee's standing argument, Freeland argued that the Debtor does have standing because she was solvent when she transferred at least one parcel of the Real Property.

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[4] Abel cited *Fondiller v. Robertson (In re Fondiller)*, 707 F.2d 441, 443 (9th Cir. 1983) (applying the "person aggrieved test" in determining appellate standing).

[5] Freeland did not explain why conversion would render the Motion moot. Implicit in this argument is that the Debtor would be a debtor in possession under chapter 11, meaning the Trustee would no longer be a representative of the estate. Accordingly, under Freeland's argument, the Motion would be moot because the Trustee would not need to employ himself.

9. The Trustee testified at the Hearing. The Trustee stated that the Real Property was transferred prior to the filing of the Bankruptcy Case, which will require attorney work outside the scope of his usual duties as a chapter 7 panel trustee.

Discussion

A trustee is a representative of the bankruptcy estate. 11 U.S.C. § 323(a). Section 323(a) gives a trustee full authority to represent the estate and to dispose of the debtor's nonexempt property that makes up the estate. 3 COLLIER ON BANKRUPTCY ¶ 323.02[1](16th ed. 2015). Pursuant to § 327(d), a trustee may act as an attorney or accountant for the estate "if such authorization is in the best interest of the estate." The burden is on the Trustee to demonstrate that his employment as attorney for the Trustee is in the best interest of the estate. *In re Interamericas, Ltd.*, 321 B.R. at 833. Before determining whether the Trustee satisfied his burden pursuant § 327(d), the Court must first address Freeland's argument that the Motion is moot. Then, the Court will determine whether the Debtor has standing to object to the Motion.

I. Mootness

In the Objection and at the Hearing, Freeland argued that the Motion *may become* moot because the Bankruptcy Case *may* convert to chapter 11. A suit becomes moot "when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Chafin v. Chafin*, 133 S. Ct 1017, 1023 (2013). Thus, a case is moot "only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Id.* "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Id.* Here, the Motion is not moot. The Bankruptcy Case is still a chapter 7 proceeding and the Trustee seeks to be paid for the legal work he will perform. The Trustee has a "concrete

interest" because if the Court does not grant the Motion, he will not get paid for legal work he will perform in representing the Debtor's estate. The Court can grant effectual relief by granting the Motion. Accordingly, the Motion is ripe for review.

II. Standing

The crux of the Trustee's argument against standing is that the Debtor is insolvent, and, thus, does not have an injury because the money belongs to the estate, not to the Debtor. Although Freeland's argument is unclear, she appeared to argue that the Debtor does have standing because the transfer of at least one parcel of the Real Property was not fraudulent, so money from the estate will be returned to her. For the Debtor to have standing to challenge the Motion, she must have both constitutional and statutory standing.

Article III of the U.S. Constitution provides for constitutional standing, and it only grants jurisdiction to federal courts over claims that constitute "cases" or "controversies." U.S. CONST. ART. III, § 2, cl. 1. "[S]tanding is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citing *Allen v. Wright*, 468 U.S. 737, 751 (1984)). The three elements required for Article III standing are: 1) injury-in-fact; 2) causation; and 3) redressability. *Id.* First, there must be "an injury-in-fact caused by a defendant's challenged conduct that is redressable by a court." *K.P. v. LeBlanc*, 627 F.3d 115, 122 (5th Cir. 2010) (citation omitted). Second, there must be a "causal connection between the injury and the conduct complained of" such that the injury is "fairly traceable" to the challenged conduct. *Lujan*, 504 U.S. at 560. Finally, "it must be likely, as opposed to merely speculative, that a favorable decision will redress the plaintiff's injury." *S. Christian Leadership Conference v. Supreme Court of La.,* 252 F.3d 781, 788 (5th Cir. 2001).

These constitutional standing requirements apply to contested matters in bankruptcy cases. *City of Farmers Branch v. Pointer (In re Pointer)*, 952 F.2d 82, 85 (5th Cir. 1992).

Article III standing must always be met, but Congress may "modify or even abrogate prudential standing requirements, thus extending standing to the full extent permitted by Article III." *St. Paul Marine & Fire Ins. Co. v. Labuzan*, 579 F.3d 533, 539 (5th Cir. 2009)). Because statutory standing requirements are not rooted in the Constitution, an opposing party may waive his or her statutory standing arguments by not raising them. See *In re* Pointer, 952 F.2d at 85 (holding that Congress may expand statutory standing to the full extent of the Constitution but may not abrogate the minimum requirements of constitutional standing); *Labuzan*, 579 F.3d at 539 (finding that the constitutional standing requirements are "immutable requirements" but the statutory standing requirements are "judicially created limits").

At the Hearing, Abel argued that the Debtor lacks standing to object because she is not a "person aggrieved" pursuant to the Ninth Circuit Court of Appeals' test for statutory standing. *In re Fondiller*, 707 F.2d at 443. However, the Ninth Circuit adopted the "person aggrieved" test in the context of determining standing to appeal in bankruptcy cases. Here, the issue is not whether the Debtor has appellate standing, but whether the she has standing to object to the Motion. Because inapplicable Ninth Circuit appellate standing precedent is the only law Abel cited in support of his standing argument, the Trustee has waived any statutory standing argument by not raising it. Nonetheless, constitutional standing is an absolute requirement, so the Court must analyze constitutional standing even though Abel did not specifically raise it.

To possess constitutional standing to object to the Motion, the Debtor must have an interest in the disposition of the estate's assets. In the Adversary Complaint, the Trustee alleged, *inter*

alia, that certain transfers of the Debtor's Real Property should be set aside and that such Real Property should be "turned over to the Bankruptcy Estate." (Adv. Dkt. 1 at 8). The Trustee further alleged that the Debtor (a) conveyed the Tampa Drive Property to her son "for little or no consideration" and retained a life interest in the property "[w]ithin two years prior to the filing of the Petition" (*Id.* at 2-3) and (b) "was insolvent or became insolvent shortly after the transfer was made or incurred, therefore, the conveyance of a life estate interest in the Tampa Drive property may be set aside and turned over to the Bankruptcy Estate." (*Id.* at 3). Freeland argued that the Debtor was solvent when she transferred certain parcels of Real Property, including the Tampa Drive Property, giving her standing to challenge the disposition of the estate's assets. Thus, it appears that whether the Debtor has standing to file the Objection hinges on whether the Debtor was insolvent at the time she transferred certain parcels of the Real Property, including the Tampa Drive Property, or became insolvent as a result.

Although the Debtor raised an issue regarding her solvency at the time she transferred certain parcels of the Real Property, the parties did not provide the Court with enough evidence to make a determination regarding the Debtor's solvency at that time. The Debtor's solvency is an issue that goes directly to the merits of the Adversary. Accordingly, the Court is unable to reach a conclusion regarding the Debtor's constitutional standing to challenge the Motion. Because the merits of the Motion and Objection nonetheless lead the Court to conclude that the Motion should be granted, the Court will proceed under the presumption that the Debtor has constitutional standing to object to the Motion.

III. Merits

In the Objection, the Debtor argued that the Trustee should not be authorized to employ

himself *nunc pro tunc* because the Motion "does not address whether his appointment as an attorney is 'in the best interest of the estate.'" (Obj. at 1). At the Hearing, Abel withdrew the *nunc pro tunc* portion of the Motion. Thus, the Court must decide whether to authorize the Trustee to act as an attorney for the estate from this point forward.

Generally, "retention of the trustee's own firm has been a very effective method of providing quality representation of the bankruptcy estates," and the Court should be able to rely on the trustee "for assistance in assessing the necessary expenses of administration." *In re Interamericas, Ltd.,* 321 B.R. at 833 (citing *In re Kusler*, 224 B.R. 180, 193 (Bankr. N.D. Okla. 1998)). As Freeland correctly pointed out, the bankruptcy court in *In re Interamericas, Ltd.* adopted a list of nine (9) factors the court must consider in determining best interest.[6] The bankruptcy court in *In re Interamericas, Ltd.* also held that, generally, "a trustee has wide latitude in selecting the legal counsel he wishes to employ. . . ." *Id.* (citing *In re Gem Tire & Serv. Co.,* 117 B.R. 874, 874 (Bankr. S.D. Tex. 1990)).

As Abel noted at the Hearing, the *In re Interamericas, Ltd.* case and its factors focused on whether it was in the best interest of the estate for a trustee to hire his *firm* to represent the estate, not whether it was in the best interest of the estate for the trustee to act as his own attorney. Additionally, the same court recently reconsidered the *In re Interamericas, Ltd.* factors in *In re*

[6] The nine (9) factors are: (1) the qualifications of the members of the firm compared to the complexity of the case; (2) whether the firm is regularly hired by others to handle similar litigation; (3) whether the anticipated litigation predominantly involves issues of bankruptcy law with which the law firm has particularized expertise; (4) whether the time commitment required to handle the case is consistent with the size of the firm and the balance of the firm's time commitments; (5) whether only a nominal amount of work must be performed; (6) the availability of other qualified firms to handle the case; (7) the rates charged by the firm compared to rates charged by other qualified firms; (8) whether there will be material cost savings to the estate; and (9) other case-specific factors. *In re Interamericas, Ltd.*, 321 B.R. at 834.

Edwards, 510 B.R. 554, 560-61 (Bankr. S.D. Tex. 2014). After declining to adopt "any list of specific factors," the bankruptcy court in *In re Edwards* held that the trustee is given wide latitude to select counsel. *Id.* The bankruptcy court was more concerned with whether the trustee gave meaningful thought to selecting counsel rather than discussing a lengthy list of factors. *Id.* at 561. Accordingly, the bankruptcy court held that it "will not substitute its judgment for that of the trustee" and, if upon reviewing the trustee's reasoning, the court "determines that the trustee failed to properly meet her fiduciary duty, the Court will deny the application." *Id.* The court further held that its obligation is to "ensure that the trustee give reasoned analysis to the employment issue and reach a rational conclusion within the bounds of the trustee's duty." *Id.*

The Court finds *In re Edwards* persuasive and likewise declines to adopt a list of specific factors for the instant Bankruptcy Case. Instead, in consideration of the wide latitude the Trustee is given in selecting counsel, the Court will look to whether the Trustee gave meaningful thought to selecting counsel.[7] In the Bankruptcy Case, it is abundantly clear that the Trustee gave meaningful thought to hiring himself as an attorney for the bankruptcy estate. It will be convenient and efficient for the Trustee to represent the estate because he lives near the properties and the clerk's office, is familiar with the complex facts of the case, and has thirty-five (35) years of experience in similar matters. The Trustee also testified that he will not duplicate Abel's legal work. The Court is persuaded that the Trustee engaged in a reasoned analysis of the Bankruptcy

[7] In *In re Heritage Real Estate Investment, Inc.*, No. 14-03603-NPO (Bankr. S.D. Miss. May 7, 2015) (Dkt. 136), this Court denied a trustee's motion to employ special counsel. The Court held that there were actual conflicts that precluded the employment of the proposed attorneys under § 327(c), and the motion failed to comply with Federal Rule of Bankruptcy Procedure 2014. *Id.* In the Bankruptcy Case, the Court will assume there is no conflict of interest because the issue has not been raised.

Case and came to the rational conclusion that he and Abel are the best persons to serve as lawyers for the Trustee. The Court is also convinced that the Trustee has met his burden under § 327(d). The Court finds, therefore, that the Objection should be overruled and the Motion should be granted.

IT IS, THEREFORE, ORDERED that the Objection is hereby overruled.

IT IS FURTHER ORDERED that the Motion is hereby granted.

##END OF ORDER##