UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

M.L. BERRY AND NELL BERRY,	**CASE NO. 95-03768-NPO**
DEBTORS.	**CHAPTER 7**

MEMORANDUM OPINION AND ORDER DENYING AMENDED MOTION TO SET ASIDE ORDER APPROVING TRUSTEE'S APPLICATION TO ASSUME ATTORNEY'S CONTINGENCY FEE EMPLOYMENT AGREEMENT AND AUTHORIZATION TO APPROVE SETTLEMENT

On June 5, 2007, there came on for hearing (the "June 2007 Hearing"), the Amended Motion to Set Aside Order Approving Trustee's Application to Assume Attorney's Contingency Fee Employment Agreement and Authorization to Approve Settlement (the "Amended Motion") (Dk. No. 129) filed by M.L. Berry (the "Debtor")[1] in the above-styled chapter 7 bankruptcy case.[2] Tylvester O. Goss, the chapter 7 trustee (the "Trustee"), filed a Response to the Amended Motion (the "Trustee's Response") (Dk. No. 131). Monsanto Company, Pharmacia Corporation, and Pfizer, Inc. (the "Monsanto Entities") also filed a Response in Opposition to the Amended Motion (the "Monsanto Entities' Response") (Dk. No. 134), to which BorgWarner Inc. and Kuhlman Corporation ("BorgWarner/Kuhlman") filed a Joinder ("BorgWarner/Kuhlman's Joinder") (Dk. No. 135). At

[1] Although both M.L. and Nell Berry are debtors in this bankruptcy case, the Court will limit its discussion solely to Mr. Berry for purposes of this Memorandum Opinion and Order.

[2] The following constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure 7052, made applicable to contested matters by Federal Rule of Bankruptcy Procedure 9014.

the June 2007 Hearing, the parties were represented as follows: Richard R. Grindstaff for the Debtor; the Trustee on his own behalf; James Larry Jones for the Monsanto Entities; and Douglas C. Noble and James W. Shelson for BorgWarner/Kuhlman. The Court, having considered the evidence presented at the June 2007 Hearing, together with the legal memoranda of the parties, concludes for the following reasons that the Amended Motion is not well taken and should be denied.

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 pursuant to 28 U.S.C. § 157(b)(2)(A). Notice of the Amended Motion was proper under the circumstances.

Facts

1. The Debtor was employed at the Kuhlman Electric Plant, located in Crystal Springs, Mississippi, for approximately twenty-nine (29) years. The Debtor asserts that while he was employed at the Kulhman Electric Plant, and prior to filing bankruptcy, he sustained injuries arising from or related to exposure to polychlorinated biphenyls ("PCBs") (April 2006 Hr'g Tr. 5:14-19).

2. On November 6, 1995, the Debtor filed a voluntary petition pursuant to chapter 12 of the Bankruptcy Code (the "Chapter 12") (Dk. No. 1). The Debtor did not disclose as an asset of the bankruptcy estate any potential claims which might arise from his exposure to PCBs (Dk. No. 4). On April 21, 1999, the Debtor converted the Chapter 12 to a case under chapter 7 of the Bankruptcy Code (the "Chapter 7") (Dk. No. 48).

3. The Trustee subsequently filed a Report of No Distribution (Dk. No. 53), and the Court issued a Discharge of Debtor (Dk. No. 56). The Chapter 7 was closed on October 1, 1999 (Dk.

No. 57).

4. On October 5, 2000, an Order Reopening the Chapter 7 (Dk. No. 62) was entered based on the Trustee's discovery of undisclosed assets of the bankruptcy estate.[3]

5. On December 3, 2001, the Debtor, along with other plaintiffs, filed a personal injury lawsuit in the Circuit Court of Hinds County, Mississippi, (the "PCB Lawsuit") against the Monsanto Entities, BorgWarner/Kuhlman , and other defendants, based on his alleged exposure to PCBs.[4] The PCB Lawsuit was removed to the United States District Court for the Southern District of Mississippi[5] (Monsanto Entities' Response, ¶ 3).

6. On November 22, 2005, the Trustee filed a Trustee's Application to Assume Attorney's Contingency Fee Employment Agreement and Application to Approve Settlement (the "Settlement Application") (Dk. No. 74), seeking to enter into a monetary settlement with the Monsanto Entities and BorgWarner/Kuhlman regarding all claims related to the Debtor's alleged exposure to PCBs.

7. The Debtor filed an Objection (the "Debtor's Objection") (Dk. No. 79) to the Settlement Application. The Debtor maintained that the proposed settlement set forth in the Settlement Application was "insufficient to cover the illnesses as a result of my exposure" (Id.at ¶ 1).

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[3] According to the Court file, the Debtor was one of a number of plaintiffs asserting asbestos claims in two cases styled as Pigford v. Glickman, Civil Action No. 97-1978 (PLF) and Brewington v. Glickman, Civil Action No. 98-1693 (PLF) (Dk. Nos. 60, 65). The Trustee subsequently entered a settlement agreement in regard to those cases (Dk. No. 69).

[4] Berry v. Monsanto Chemical Co., Civil Action No. 251-01-1383-CIV.

[5] Berry v. Kuhlman Corp., Civil Action No. 3:04CV134TSL-JCS.

8. The Court[6] conducted a hearing on the Settlement Application and the Debtor's Objection on April 28, 2006 (the "April 2006 Hearing"). The Debtor was represented at the April 2006 Hearing by J. Thomas Ash. At the April 2006 Hearing, Paul Koerber ("Koerber"), one of the Debtor's attorneys in the PCB Lawsuit, testified that he had retained an expert, James G. Dahlgren, M.D. ("Dr. Dahlgren"), to conduct a blood serum test on the Debtor to determine his level of PCB exposure (April 2006 Hr'g Tr. 10:17-21). A blood serum test was conducted on the Debtor on October 14, 2000. The test reflected that the Debtor's blood serum was 52.5 ppb, an elevated level indicating PCB exposure (April 2006 Hr'g Tr. 10:22-23). Koerber testified at the April 2006 Hearing that the blood serum test results were insufficient for Dahlgren to conclude that the Debtor's alleged medical conditions were caused by PCBs (April 2006 Hr'g Tr. 11:12-21). The Debtor also admitted at the April 2006 Hearing that no doctor had told him that his alleged illnesses were directly related to PCB exposure (April 2006 Hr'g Tr. 17:8-10). Because of the uncertainty of the litigation due to the difficulty of proving that PCB exposure caused the Debtor's injuries,[7] Koerber stated that it was his opinion that the Settlement Application should be approved as being in the best interest of the Debtor's bankruptcy estate (April 2006 Hr'g Tr. 6:21-7:1). The Court determined that the Settlement Application should be approved, and an Order Approving the Settlement Application (the "Order Approving Settlement") (Dk. No. 90) was entered on May 3, 2006. The Trustee also executed Settlement and Release Agreements as to the Monsanto Entities and BorgWarner/Kuhlman (Monsanto Entities' Response, Ex. D). The Order Approving Settlement was

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[6] Prior to June 1, 2006, this bankruptcy case was assigned to Judge Edward Ellington.

[7] The causation issue was further complicated by the allegation that the Debtor also had been exposed to asbestos (April 2006 Hr'g Tr. 13:16-23).

not appealed.[8]

9. On April 30, 2007, the Debtor filed the Amended Motion presently before the Court. In the Amended Motion, the Debtor alleges that he has newly discovered evidence which, pursuant to Federal Rule of Civil Procedure 60(b), warrants setting aside the Order Approving Settlement. The Debtor explains that, subsequent to the April 2006 Hearing, he obtained from David Carpenter, M.D. ("Dr. Carpenter") a medical expert report (the "Carpenter Report") which opines that the Debtor's PCB level of 52.5 ppb is exceptionally high and that it is reasonably probable that his medical symptoms are related to PCB exposure.[9] The Debtor contends that the Carpenter Report therefore indicates that his exposure to PCBs caused his alleged injuries, and that the Order Approving Settlement should be set aside so that the PCB claims can be litigated or settled in light of this newly discovered evidence (Amended Motion, ¶¶ 2, 3).

10. In the Trustee's Response filed on May 3, 2007, the Trustee maintains that the evidence presented at the April 2006 Hearing established that the Debtor is unable to demonstrate that PCB exposure caused his alleged injuries. Moreover, the Trustee asserts that he is precluded from litigating the PCB Lawsuit in the District Court based on prior rulings in that case.

11. The Monsanto Entities' Response, filed on May 22, 2007, alleges that no newly

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[8] Despite the entry of the Order Approving Settlement by this Court and the execution of the Settlement and Release Agreements, the Debtor continued prosecuting his PCB Lawsuit in the United States District Court for the Southern District of Mississippi. On January 18, 2007, the District Court ordered the Trustee to be substituted as the plaintiff in place of the Debtor in the PCB Lawsuit, and dismissed with prejudice the claims brought in that cause by the Debtor. *See* Berry v. Kuhlman Corp., Civil Action No. 3:04CV134TSL-JCS.

[9] At the June 2007 Hearing, the Court admitted the Carpenter Report for the limited purpose of determining whether it constituted newly discovered evidence, but did not admit it for the truth of the matters asserted therein (June 2007 Hr'g Tr. 38:19-39:1).

discovered evidence exists in that the Debtor has known his blood serum level of 52.5 ppb since the blood serum test conducted on October 14, 2000.

12. BorgWarner/Kuhlman's Joinder, filed on May 23, 2007, reiterates that no newly discovered evidence exists in that the Debtor knew the results of the blood serum test conducted on October 14, 2000, at the time of the entry of the Order Approving Settlement.

Discussion

1. Standing

The first issue the Court must consider is whether the Debtor has standing to assert the Amended Motion. Under 11 U.S.C. § 541,[10] "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)). In addition to the property of the estate specified in § 541, the Debtor's Chapter 12 included all property of like kind "that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7 of this title, whichever occurs first; . . . ." § 1207(a)(1). 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 Debtor's PCB Lawsuit, which stems from his prepetition exposure to PCBs, became property of the estate upon the filing of the Debtor's Chapter 12 and remained so upon conversion to the Chapter 7.

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

Because the PCB Lawsuit is property of the estate, the Trustee has the exclusive authority to prosecute, settle and release the PCB Lawsuit. 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 the estate, then the trustee has exclusive standing to assert the claim."); Wieburg v. GTE Southwest Inc., 272 F.3d 302, 306 (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 Mgf. Co., 143 F.3d 1122, 1126 (8th Cir. 1998)). Thus, upon the filing of the Chapter 12 and the subsequent conversion to the Chapter 7, the Debtor had no standing to pursue or settle the PCB Lawsuit. It follows that the Debtor does not have standing to challenge the Order Approving Settlement. *See* Ginther v. O'Connell (In re Ginther), 791 F.2d 1151, 1153 (5th Cir. 1986) (where district court ruled that debtor lacked standing to challenge order approving settlement agreement between trustee and creditor).

2. Burden of Proof

Even assuming that the Debtor has standing to request that the Court set aside the Order Approving Settlement, the Debtor has failed to meet his burden of proof under Federal Rule of Civil Procedure 60(b), which is made applicable to bankruptcy proceedings pursuant to Federal Rule of

Bankruptcy Procedure 9024. In relevant part, Rule 60(b) provides:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b) . . . .

Federal Rule of Civil Procedure 60(b).

"To succeed on a motion for relief from judgment based on newly discovered evidence, [the] law provides that a movant must demonstrate: (1) that it exercised due diligence in obtaining the information; and (2) that the evidence is material and controlling and clearly would have produced a different result if present before the original judgment." General Univ. Sys., Inc. v. Lee, 379 F.3d 131, 158 (5th Cir. 2004) (quoting Goldstein v. MCI WorldCom, 340 F.3d 238, 257 (5th Cir. 2003)). In addition, "[t]he newly discovered evidence must be in existence at the time of trial and not discovered until after trial." Id. (quoting Longden v. Sunderman, 979 F.2d 1095, 1102-03 (5th Cir. 1992)).

In this case, the Debtor obtained the Carpenter Report subsequent to the entry of the Order Approving Settlement. The Debtor contends that the Carpenter Report constitutes newly discovered evidence which links his PCB level of 52.5 ppb to his alleged medical symptoms. The Debtor reasons that, based on the Carpenter Report, he could establish that the PCB claims are more valuable than anticipated, and argues that, consequently, the Order Approving Settlement should be set aside so that the PCB claims can be litigated or settled for a higher monetary amount (Amended Motion, ¶¶ 2, 3, 4).

However, at the June 2007 Hearing, the Debtor failed to prove that he exercised due diligence in obtaining the Carpenter Report. As noted previously, Koerber and the Debtor's other attorneys

employed an expert, Dr. Dahlgren, who conducted a blood serum test on the Debtor in October 2000. Dr. Dahlgren was unable to conclude from the results of the Debtor's blood serum test that the Debtor's exposure to PCBs caused his alleged injuries. Based on the lack of a causal link between the PCB exposure and the Debtor's alleged injuries, the Debtor's attorneys recommended settlement of the PCB claims rather than litigation (April 2006 Hr'g Tr. 10:17-23; 11:18-21; 6:23-25). Clearly, the October 2000 blood serum test results were available to the Debtor and his attorneys prior to the April 2006 Hearing.

Nevertheless, the Debtor contended at the June 2007 Hearing that although his attorneys possessed the written blood serum test results prior to the April 2006 Hearing, they withheld those written results from the Debtor, thereby preventing him from obtaining an expert report based on those written results until after the April 2006 Hearing.[11] Yet, even if the Debtor personally was not provided the written blood serum test results by his attorneys, methods exist by which the Debtor could have secured the written results so that he could have obtained an expert medical report prior to the April 2006 Hearing.[12] In fact, at the June 2007 Hearing, the Court asked the Debtor's witness,

[11] It is unclear from the pleadings or the testimony exactly how the Debtor ultimately obtained the written blood test results. It is clear, however, that once obtained, the Debtor provided the written blood test results to Dr. Carpenter, who then prepared the Carpenter Report (June 2007 Hr'g Tr. 42:13-15; 42:25-43:6).

[12] For instance, the Debtor could have subpoenaed the blood test results from Dr. Dahlgren prior to the April 2006 Hearing. Moreover, despite his alleged difficulty in obtaining the written blood test results, the Debtor testified at the June 2007 Hearing that he was aware that his blood serum level was 52.5 ppb as of August 2002 when his deposition was taken (Monsanto Entities' Response, Ex. F).

Michael Allred ("Allred"),[13] his opinion as to why a medical expert report was not prepared prior to the April 2006 Hearing.[14] The Court inquired, "What I'm asking you today is can you testify that the expert witness that you have today [Dr. Carpenter] could not have done that report prior to the approval of the settlement? [W]ere the facts available to that expert to do that report prior to approval of the settlement?" Allred replied, "To be honest, I don't know whether he could or not." (June 2007 Hr'g Tr. 13:24-14:7). The Court further questioned, "So you don't know whether it's [the Carpenter Report] newly discovered?" Allred answered, "I know that it's newly discovered to Mr. Berry because he tried hard to get access to this and could not. And he tried hard to get access to expert reports about his condition from his former lawyers, and he could not." The Court then asked, "Is that a function of the purported lack of cooperation between Mr. Berry and his lawyers or that the information wasn't available or was not obtainable?" Allred responded, "Your Honor, I don't know." (June 2007 Hr'g Tr. 15:10-23). However, Allred concluded by stating that, had he been the Debtor's attorney at that time, he believed he would have been able to obtain the report prior to the April 2006 Hearing. (June 2007 Hr'g Tr. 27:21-28:8).

Based on the foregoing, the Court is persuaded that the Debtor did not exercise due diligence in obtaining the blood serum test results which form the basis of his purported newly discovered evidence. *See* Provident Life & Acc. Ins. Co. v. Goel, 274 F.3d 984, 999-1000 (5th Cir. 2001) (insurance applicant who had access to document he contended contained a forged signature was not

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[13] Michael Allred, the Debtor's attorney in the District Court litigation referenced *infra*, stated at the June 2007 Hearing that he also had "agreed to become involved to try to investigate the case and help Mr. Berry" in regard to this bankruptcy proceeding (June 2007 Hr'g Tr. 4:19-20).

[14] No evidence was presented at either the April 2006 Hearing or the June 2007 Hearing that Dr. Dahlgren ever prepared a medical expert report.

entitled to relief under Rule 60(b) because he failed to use due diligence to consult with handwriting expert prior to entry of judgment); Jefferson County Sch. Dist. v. Lead Indus. Ass'n, Inc., 223 F.Supp.2d 771, 773 (S.D. Miss. 2002) (Rule 60(b)(2) motion denied because plaintiff failed to exercise due diligence in obtaining advertisements, answers, or expert affidavit prior to entry of judgment).

Moreover, the Carpenter Report would not clearly have produced a different result than the one reached at the April 2006 Hearing. The blood serum test results conducted in October 2000 revealed that the Debtor's PCB level was 52.5 ppb. Koerber stated at the April 2006 Hearing that the Debtor's PCB level could not be linked definitively to his alleged injuries, and that in his opinion, the Settlement Agreement was in the best interest of the bankruptcy estate. Although the Debtor takes the position that the Carpenter Report indicates that his alleged injuries were caused by his exposure to PCBs, the Carpenter Report nonetheless is based upon the same blood test results from October 2000. Therefore, the Carpenter Report would not clearly have produced a different result.

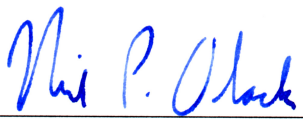
Finally, and most importantly, the Debtor's blood serum test was conducted on October 14, 2000. Therefore, the blood serum test results were in existence at the time of the April 2006 Hearing. No expert report was obtained prior to the April 2006 Hearing. Therefore, although the Carpenter Report itself is new, it is nevertheless based upon blood serum test results obtained in October 2000 which were in existence at the time of the April 2006 Hearing. Consequently, while the Carpenter Report is newly produced, it simply is not newly discovered evidence. *See* Johnson Waste Materials v. Marshall, 611 F.2d 593, 598 (5th Cir. 1980) (evidence merely "newly produced" does not constitute evidence "newly discovered"); Coastal Transfer Co. v. Toyota Motor Sales,

U.S.A., 833 F.2d 208, 212 (9th Cir. 1987) (revised testimony of expert did not constitute newly discovered evidence); Questrom v. Federated Dept. Stores, Inc., 192 F.R.D. 128, 132 (S.D.N.Y. 2000) (post-judgment affidavit from debtor's own expert did not constitute newly discovered evidence).

Based on the foregoing, the Amended Motion should be denied. A separate final judgment will be entered in accordance with Federal Rule of Bankruptcy Procedure 9021.

IT IS, THEREFORE, ORDERED that the Amended Motion is denied.

SO ORDERED,



Neil P. Olack
United States Bankruptcy Judge
Dated: July 11, 2007