UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF ALABAMA

In re

EDWARD S. CHILDS,

Debtor

Case No. 00-6208-WRS
Chapter 13

CURTIS C. REDING, TRUSTEE,

Plaintiff

v.

MORRIS BART, et al.,

Defendants

Adv. Pro. No. 03-1071-WRS

MEMORANDUM DECISION

This Adversary Proceeding came before the Court for hearing on July 15, 2005, upon the Trustee's Motion to Dismiss the Counterclaim (Doc. 199) and the Court's Order to Show Cause dated April 19, 2005, (Doc. 192) relating to the Third Party Complaint filed by Gallagher on April 11, 2005. (Doc. 188). For the reasons set forth below, the Trustee's motion to dismiss is GRANTED IN PART AND DENIED IN PART. In addition, the Third Party Complaint filed by the Gallagher Defendants is DISMISSED.

I. FACTS

This Adversary Proceeding began as an action by Chapter 13 Trustee Curtis C. Reding to recover personal injury settlements which Reding contends are property of the bankrupt estates of Edward Childs and Charstain Tina Hicks. Over the past two years, this Adversary Proceeding has become considerably more complex, now involving the estates of 60 different debtors in

separate bankruptcy cases. The common theme is that each debtor obtained a cash settlement for a personal injury suit which the Plaintiffs contend are property of the various bankruptcy estates. The Defendants in this Adversary Proceeding are lawyers who represented the debtors in the suits. The Plaintiffs further contend that payment of the Defendants' fees are subject to this Court's supervision.

The Defendants have raised a flurry of contentions in their defense. It is not necessary to catalog all of the defenses raised for purposes of disposing of the matters at hand. The defense which is relevant here is that Gallagher contends that he was mislead by debtors (i.e. his clients) and that he should not be held responsible for any unknowing conversion of property of bankrupt estates or any inadvertent violations of the Bankruptcy Code. While Reding disputes the factual accuracy of this contention, for purposes of this motion, the Court will assume that the debtors all misled their lawyers.

II. CONCLUSIONS OF LAW

A. THE DEFENDANTS ARE ENTITLED TO RAISE A DEFENSE TO THE EFFECT THAT THEY WERE MISLED BY THEIR CLIENTS BUT THEY MAY NOT RECOVER DAMAGES FROM THE TRUSTEE

While the Trustee's complaint is not specifically cast in terms of an action for turnover pursuant to 11 U.S.C. § 542, the Court is of the view that the Trustee's complaint is in the nature of an action to recover property of several bankruptcy estates. Whether suit is brought pursuant to § 542, § 544 or some other provision of the Bankruptcy Code, it is not necessary to state with any greater specificity at this juncture. In substance, the Trustee's action seeks to recover property of bankruptcy estates.

The Defendants have, in various ways, raised a defense to the effect that they have been misled by their clients. Section 542(c) codifies what would otherwise be a defense to an action for conversion.[1] In other words, if the evidence establishes that the Defendants did not have actual notice or knowledge of the various bankruptcy filings, then they do not have any liability to the Trustee, even if they did in fact pay over property of a bankruptcy estate to a debtor who was not legally entitled to receive the money. As clarified at the July 15, 2005 hearing, this is in substance what the Gallagher Defendants are attempting to do by way of their counterclaim against the Plaintiffs.

The substance of the Plaintiff's motion to dismiss the Counterclaim is that the Gallagher Defendants may not proceed against the Trustee personally on any theory of liability. (Doc. 199). As the Gallagher Defendants do not contend that they seek anything other than the right to set up their counterclaims against the various estates, and that they do not seek to recover anything from the Trustee in his personal capacity, it does not appear that there is any real dispute here.

In addition, Gallagher and the other Defendants contend that they are entitled to their attorney's fees. In the event Gallagher or the other Defendants prevail on their defense, that they did not have actual notice or knowledge of the bankruptcy cases, it would appear that the issue as to fees would no longer be in dispute. On the other hand, if the evidence were to show that the Defendants did have knowledge of the bankruptcy cases, and acted in disregard of the

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[1] 11 U.S.C. § 542(c) provides that: "[e]xcept as provided in section 362(a)(7) of this title, an entity that has neither actual notice nor actual knowledge of the commencement of the case concerning the debtor may transfer property of the estate, or pay a debt owing to the debtor, in good faith and other than in the manner specified in subsection (d) of the section, to an entity other than the trustee, with the same effect as to the entity making such transfer or payment as if the case under this title concerning the debtor had not been commenced."

requirements of the Bankruptcy Code, then the question of their entitlement to fees would be at issue. That is a question for another day.

To the extent that Gallagher's Counterclaim against Reding may be read for the proposition that he may obtain damages from Reding in his personal capacity, the motion to dismiss is GRANTED. To the extent that Gallagher seeks to set up his defense, limiting his recovery as discussed above, the motion to dismiss is DENIED.

B. GALLAGHER'S THIRD PARTY COMPLAINT AGAINST THE 33 NAMED DEBTORS IS DISMISSED, WITHOUT PREJUDICE, FOR HIS FAILURE TO SEEK LEAVE OF COURT

The next question presented here is whether Gallagher's most recent Third-Party Complaint should be dismissed for failure to obtain leave of court. Rule 14, Fed. R. Civ. P., which is made applicable to these proceedings pursuant to Rule 7014, Fed. R. Bankr. P. provides, in part, that:

> (a) At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. The third-party plaintiff need not obtain leave to make the service if the third-party plaintiff files the third-party complaint not later than 10 days after serving *the original answer*. Otherwise the third-party plaintiff must obtain leave on motion upon notice to all parties to the action. (emphasis added).

To rephrase the question, may Gallagher serve his second and latest Third- Party Complaint as a matter of right?

Rule 14(a), Fed. R. Civ. P., provides that a defendant may file a third-party complaint within 10 days of service of the "the original answer." In this Adversary Proceeding, it would

appear that Gallagher's "original answer" was filed on August 28, 2003, almost two years ago. Gallagher argues that his answer to the Trustee's Third Amended Complaint is an original answer, at least with respect to 32 of the 33 named Debtors. The Plaintiff's original complaint named only two Debtors, while the Third Amended Complaint names 60, 33 of which apply to Gallagher.

If Gallagher's reading of Rule 14 is correct, every amended complaint, or at least every amended complaint which adds at least one new claim would give rise to another "original answer," giving each defendant the absolute right to join yet more parties to the suit. Gallagher's reading conflicts with the plain language of Rule 14 which provides that "the third-party plaintiff need not obtain leave to make service if the third-party plaintiff files the third-party complaint not later than 10 days after serving *the original answer*." The rule plainly states "the original answer" which suggests that there can be only one original answer. The words "the original" taken together underscore the idea that there is only one original answer.

Gallagher cites a recent decision from a District Court in Louisiana in support of his reading of Rule 14. United National Insurance Corporation v. Jefferson Downs Corporation, 220 F.R.D. 456 (M.D. La. 2003). The District Court in United National Insurance, referring to its approach as "pragmatic" states that "[it allows] an answer to an amended complaint to function as an original answer, within the meaning of the rule, if the amended complaint changes the need for impleader. (citation omitted). Under this view, the amended complaint must set forth new theories of liability, not just include new factual allegations." Id. at 458. The problem with the District Court's approach in United National Insurance is that it does violence to the plain language of the rule and creates a poorly defined test for the determination of whether an answer

to an amended complaint is or is not "original" for purposes of Rule 14. Indeed, under the purported test, an answer to an amended complaint is "original" for purposes of Rule 14, if "the amended complaint changes the need for impleader." Id. at 458. That reasoning is wholly circular as any amendment of substance could be said to change the need for impleader. The Advisory Committee Notes to the 1963 amendments to Rule 14 state the following:

> Under the amendment of the initial sentences of the subdivision, a defendant as a third-party plaintiff may freely and without leave of court bring in a third-party defendant if he files the third-party complaint not later than 10 days after he serves his original answer. When the impleader comes so early in the case, there is little value in requiring a preliminary ruling by the court on the propriety of the impleader.

This text clearly indicates that the drafters of the Rule intended that the "original" answer means the first answer filed. This is because if any answer could be deemed an original, for purposes of Rule 14, it would not necessarily "come so early in the case." Gallagher's contention that any number of answers might be considered original is rejected for four reasons: first, it is contrary to the plain language of Rule 14(a); second, it is contrary to the intention of the drafters of Rule 14(a); third, it necessarily results in an oxymoron–that there are potentially many original answers–and fourth, it gives rise to an unworkable test to be applied in a failed effort to distinguish which answers are truly original.

One should bear in mind that the Court is always free to grant a party leave to file a third-party complaint at any stage of the litigation. The narrow question presented here is whether Gallagher may join 33 additional parties, as a matter of right, two years into the litigation. This litigation is now two years old and trial is scheduled for December 12, 2005. To allow Gallagher to bring in 33 new parties at this advanced stage of the litigation would further complicate what

has already become a complex case. Discovery would almost certainly have to be extended and the scheduled trial date reset for a later date. Moreover, even if the latest third-party complaint is allowed, the Court would probably have to sever the trial of these claims so as to not to turn a two-week trial into a four- or six-week trial.

Gallagher is free to bring a separate civil action for fraud against their former clients, notwithstanding the fact that he refers to these claims against his 33 clients as "compulsory counterclaims." As Gallagher has not been sued by his former clients, his most recent third-party complaint cannot be properly termed a counterclaim insofar as it relates to the 33 clients. As Gallagher has not been denied the right to sue his clients, his contention that he would be denied due process if he cannot proceed against them is without merit.

Done this 19th day of August, 2005.

/s/ William R. Sawyer
United States Bankruptcy Judge

c: Steve Olen, Attorney for Plaintiffs
Frank L. Parker, Esq.
Von G. Memory, Esq.
David B. Anderson, Esq.
Joseph P. Schilleci Jr., Esq.