

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

MICHAEL A. CARZO
LISA A. CARZO

CASE NO. 90-02868

Debtors

APPEARANCES:

RANDY J. SCHAAL, ESQ.
Trustee
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Sherrill, New York 13461

EVANS, BANKERT, COHEN, LUTZ
& PANZONE, ESQS.
Attorneys for Debtors
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EDWARD D. EARL, ESQ.
Of Counsel

JOHN A. LONGERETTA, ESQ.
Special Counsel to Trustee
23 Hopper Street
Utica, New York 13501

KIM LEFEBVRE, ESQ.
Assistant U.S. Trustee
50 Chapel Street
Albany, New York 12207

STEPHEN D. GERLING, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Court considers three motions filed in the within bankruptcy case. The first motion filed April 13, 1994 by Michael A. Carzo and Lisa A. Carzo ("Debtors") seeks this Court's approval of the settlement of a tort claim of the Debtors arising out of a pre-petition motor vehicle accident as well as the payment of counsel fees to John A. Longeretta, Esq. ("Longeretta") as Special Counsel to the Trustee Randy J. Schaal, Esq. ("Trustee").

The second motion is an objection to the Debtors' claim to an exemption of the proceeds of the personal injury action by the Trustee, filed April 19, 1994.

The third motion filed April 22, 1994 by the Trustee, seeks an order removing Longeretta as Special Counsel and requiring Longeretta to indemnify the Debtors' estate.

All three motions appeared on the Court's motion calendar at Utica, New York on May 31, 1994. At that time the Court heard oral argument, reserved decision and gave the parties until June 16, 1994 to file memoranda of law.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction of these contested matters pursuant to 28 U.S.C. §§1334(b) 157(a), 157 (b)(1) and (2)(A) and (B).

FACTS

On November 23, 1990, Debtors filed a voluntary petition in bankruptcy pursuant to Chapter 7 of the Bankruptcy Code (11 U.S.C. §§101-1330) ("Code"). Prior to the date of filing, the Debtor Lisa A. Carzo had been injured in a motor vehicle accident which occurred on or about June 16, 1989.

Following the filing of Debtors' petition, the Trustee sought and obtained the appointment of Longeretta to act as Special Counsel "for the purpose of pursuing a possible personal injury

claim against Barbara Martin, Irene G. Martin, Earl A. Cassavaugh and Anchor Motor Freight, Inc., relative to an automobile accident occurring on June 16, 1989, and resulting in personal injuries to the Debtor Lisa Carzo." (See Order dated December 24, 1991).

On or about June 21, 1993, after having commenced litigation in state court on the personal injury claim, Longeretta's office contacted the Trustee and advised him that an offer to settle the personal injury claim had been received in the sum of \$30,000, but that the Debtor Lisa A. Carzo did not wish to accept the offer. (See letter dated July 23, 1993 from Lenora A. Fanelli, Esq. to Trustee, attached to Trustee's motion papers). Thereafter, the Trustee and Longeretta corresponded with each other regarding settlement of the claim.

On or about February 28, 1994, both Debtors executed a General Release ("Release") to all of the defendants in the state court litigation in return for the sum of \$30,000. The Release provided that the settlement was apportioned \$7,500 for personal bodily injury and \$22,500 for loss of future earnings. The Trustee was not a party to the Release nor is there any indication that it was subject to the approval of this Court. (See General Release attached to Trustee's motion papers).

On April 12, 1994, as indicated, Debtors, through their bankruptcy counsel Evans, Bankert, Cohen, Lutz and Panzone, Edward Earl, Esq. of Counsel ("Earl"), filed one of the instant motions seeking an order approving a settlement of the tort claim for the sum of \$30,000, which sum was to be apportioned as outlined by the Release, attorney's fees to Longeretta in the sum of \$10,000 and a

declaration as to whom Longeretta represented with regard to the personal injury claim.

On April 19, 1994, the Trustee filed an objection to the Debtors' claim of exemption of the personal injury proceeds to the extent that the claimed exemption exceeds \$7,500, and on April 22, 1994, the Trustee moved for an order removing Longeretta as Special Counsel, denying him all attorney's fees and requiring Longeretta to indemnify the estate.

ARGUMENTS

Debtors contend that the settlement pursuant to which Lisa A. Carzo shall receive a total of \$30,000 for personal injury and loss of future earnings should be approved by this Court and that said sum should be deemed as exempt.

Longeretta argues that he is entitled to a legal fee of \$10,000, a sum equal to one-third of Debtors' recovery, plus costs and disbursements, all of which was authorized pursuant to the Order of this Court which appointed him Special Counsel. Longeretta also refers to the Agreement he had with Debtors pre-petition which entitled him to a 1/3 contingency fee. Finally, Longeretta seeks a declaration from this Court as to whom he represents, the Trustee or the Debtors.

The Trustee asserts that Longeretta has failed to cooperate with him in the resolution of the personal injury claim. He argues that Longeretta acted only in the interests of the individual Debtors and to the detriment of the Debtors' estate,

citing numerous letters between himself and Longeretta. The Trustee contends that Longeretta worked with Earl, Debtors' bankruptcy counsel, in structuring the settlement in such a way that the Debtors' estate would receive nothing because Longeretta labored under the erroneous belief that the Debtors, and not the Trustee, were his clients.

DISCUSSION

The various motions before the Court raise a number of issues. First is the question of whether the settlement of the pending state court tort action for the sum of \$30,000 is reasonable and in the best interest of all of the parties affected thereby. Second is the issue of what portion, if any, of the settlement may be exempted by the Debtors. Third, as Special Counsel, whom did Longeretta represent, and finally, is Longeretta entitled to a fee of \$10,000.

Clearly, the \$30,000 settlement becomes property of the estate regardless of the Debtors' ability to exempt some or all of the settlement amount pursuant to §282(3) of the New York Debtor and Creditor Law ("NYD&CL") which defines the limits of exemptions that may be claimed by debtors domiciled within the State of New York at the time of filing. See Code §522(b). See also In re Carson, 82 B.R. 847, 850 (Bankr. S.D.Ohio 1987).

Thus, the Court will turn first to the question of exemption raised by the Trustee's objection filed pursuant to Code §522(1) and Federal Rule of Bankruptcy Procedure ("Fed.R.Bankr.P.")

4003(b). The Trustee asserts that pursuant to NYD&CL §282(3), Debtor Lisa A. Carzo is entitled to a maximum exemption of \$7,500, presumably "on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss". The Trustee objects to the balance of Debtors' claimed exemption.¹ The Trustee asserts that the settlement has been structured as set forth in the "General Release" dated February 28, 1994, and attached to the motion papers "to deny the bankruptcy estate any portion of the \$30,000." (Affidavit of Randy J. Schaal, Esq., Trustee sworn to on April 20, 1994). The Trustee argues that the settlement was the product of a negotiation between Longieretta and Earl, the former acting contrary to his obligations as Special Counsel to the Trustee.

This Court notes that the record is devoid of any competent proof which would support the Debtors' claim to an exemption of any portion of the \$30,000, including the \$7,500 which the Trustee apparently does not oppose.

In a somewhat similar factual setting, Chief Bankruptcy Judge Conrad Duberstein, sitting in the Eastern District of New York, examined a debtor's claimed exemption of loss of future earnings in the case of In re Corbi, 149 B.R. 325 (Bankr. E.D.N.Y. 1993). At page 331, Chief Judge Duberstein observed "Given the nature and extent of the injury, it is possible that the Debtor may suffer some loss of future income. However, the Court cannot allow

¹ On April 13, 1994, Debtors filed an amendment to Schedule B-4 wherein they claimed an exemption of \$20,000 in the "Net Proceeds of Motor Vehicle Accident Claim". Debtors original Schedule B-4 had claimed as exempt "Motor Vehicle Accident Claim \$7,500".

the Debtor to simply conjure up a figure and then exempt that amount as loss of future income." Chief Judge Duberstein concluded that since the state court in which the personal injury action had been settled had not inquired "into the amount reasonably necessary to the support the Debtor and his dependents", it thus became the responsibility of the bankruptcy court. Id. at 331. The Court scheduled an evidentiary hearing on that issue. Accord In re Carson, supra, 82 B.R. at 857.

It would appear in the matter sub judice that this Court has a similar responsibility. Nowhere in any of the pleadings is there any evidence of the Debtors' projected loss of future earnings. In fact, the only reference to Debtor Lisa Carzo's actual injuries is contained in the Affidavit of Longeretta sworn to on May 24, 1994, wherein he describes them as "soft tissue injuries" which might fail "to meet the threshold of a serious injury as defined in the applicable section of the Insurance Law."

As in the case of Corbi, supra, it is apparent that the \$22,500 being allocated to loss of future earnings in the Release was a matter of pure conjecture conjured up, the Trustee contends, to strip creditors of any distribution.

The Court turns next to the Trustee's motion which seeks to remove Longeretta as Special Counsel, deny him attorney's fees and require him to indemnify the estate. Incidental to this motion, the Court must address Longeretta's request for a declaration as to whom he represents.

Again, as Chief Judge Duberstein points out in Corbi, supra, "both the Corbi's and the Trustee had a shared interest in

seeing the estate realize the maximum possible in the personal injury action." Id. at 333.

Special Counsel appointed pursuant to Code §327(e) is thus required to hold no interest adverse to that of the debtor or the estate and in fact represents the best interests of both. It is only where those interests become adverse to each other that a problem develops. In the instant case, it was Longeretta's obligation to obtain the best possible recovery in the personal injury action while remaining neutral on the issue of exemption. He did not represent the Debtors in their bankruptcy case and therefore had no ethical obligation to structure a settlement so as to maximize their bankruptcy exemptions. If Longeretta in fact structured the settlement in favor of the Debtors and to the detriment of the estate, it is the view of this Court that he has acted improperly.

The Trustee contends that Longeretta kept him uninformed throughout the settlement negotiations, contending that the Debtors, rather than the Trustee, were his clients. The Trustee asserts that Longeretta acknowledged that he worked with Earl to negotiate the best settlement for the Debtors, not for the estate. Longeretta denies the Trustee's allegations, but alleges that he was presented with an ethical dilemma of representing two clients simultaneously. Longeretta asserts that the Debtors refused to sign the Release unless it conformed to the advice of their bankruptcy counsel and that he did not believe the language of the Release would injure the bankruptcy estate.

While the Court clearly does not believe that

Longeretta's conduct rose to the level of debtor's special counsel in Corbi, supra, the Court does believe that if the Trustee can prove his allegations he may be entitled to costs and expenses and the Court may reconsider the basis of Longeretta's compensation pursuant to Code §328(a).

Finally, the Court upon review of all of the allegations herein concludes that the settlement of \$30,000 is in the best interest of the Debtors and the Trustee and will approve same. The Court, however, does not at this juncture approve the allocation of the settlement amount as outlined in the Release except to the extent of allocating \$7,500 to the Debtor Lisa A. Carzo's exemption pursuant to NYD&CL §282(3)(iii).

The Court will, therefore, hold an evidentiary hearing at the U.S. Courthouse, Utica, New York on October 20, 1994 at 9:00 a.m. to determine the extent to which the Debtor Lisa A. Carzo may be entitled to exempt any portion of the settlement pursuant to NYD&CL §282(3)(iv) and to further determine the Trustee's claim for indemnification from Longeretta, as well as the amount of fees to be awarded to Longeretta in connection with the personal injury action.

IT IS SO ORDERED.

Dated at Utica, New York

this day of September 1994

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge