UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

DOROTHY ANN CONLON — CASE NO. 95-64406

Debtor

L. DAVID ZUBE, ESQ. Chapter 7 Trustee

Plaintiff

vs. — ADV. PRO. NO. 96-70235A

EDWARD F. CRUMB, ESQ.

Defendant

APPEARANCES:

LAW OFFICES OF LEONARD LEIBOWITZ
Attorneys for Plaintiff
322 West 48th St., 6th Floor
New York, New York 10036

HARVEY S. MARS, ESQ.
Of Counsel

COSTELLO, COONEY & FEARON
Attorneys for Defendant
Salina Place
205 South Salina Street
Syracuse, New York 13202-1307

EDMUND J. GEGAN, ESQ.
Of Counsel

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS

This adversary proceeding arises out of the allegedly negligent legal representation of the Debtor, Dorothy A. Conlon ("Debtor"), by her former attorney, Edward F. Crumb ("Defendant"), in a pre-petition case reported as *Board of Trustees v. Canny*, 900 F. Supp. 583 (N.D.N.Y. 1995).

Having been held jointly and severally liable in that case for damages in the amount of $1,694,419.79, Debtor filed a petition in this Court on December 7, 1995, seeking protection under chapter 11 of the United States Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code"). On September 3, 1996, Debtor commenced this adversary proceeding against Defendant, alleging that Defendant's negligent failure to make a timely demand for arbitration had deprived her of certain statutory defenses under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act ("MPPAA"). A stipulation approved by the Court on September 30, 1997, substituted Chapter 7 Trustee L. David Zube ("Chapter 7 Trustee") for Debtor as the plaintiff in this adversary proceeding, following the conversion of Debtor's case from Chapter 11 to Chapter 7 on September 25, 1997.

In a Memorandum-Decision issued on March 16, 1998, the Court denied a previous motion for partial summary judgment filed by the Chapter 7 Trustee, and additionally denied a motion by Defendant to dismiss or abstain from hearing the adversary proceeding. *See Zube v. Crumb (In re Conlon)*, Adv. No. 96-70235A (Bankr. N.D.N.Y. March 16, 1998). Following further discovery by both parties, the Chapter 7 Trustee filed a second motion for summary judgment on March 30, 1999. The Court heard argument on the Chapter 7 Trustee's motion on May 11, 1999, after which the parties were given an opportunity to submit additional memoranda of law, and on June 15, 1999, the matter was submitted for decision.

JURISDICTIONAL STATEMENT

The Court has jurisdiction over the parties and subject matter of this non-core related adversary proceeding pursuant to 28 U.S.C. §§ 1334(b), 157(a). and 157(c)(1).[1]

FINDINGS OF FACT[2]

In or about 1959, Debtor inherited an interest in Canny Trucking Co. ("Canny Trucking"), a family-owned freight company based in Binghamton, New York. Prior to 1985, Debtor was one of six shareholders in Canny Trucking, along with her sisters, Rita Fletcher and Mary Louise Hacker, and her first cousins, William Canny, Joseph Canny, and Barbara Briggs. Although Debtor was a board member of Canny Trucking, and appears to have served as its president at some point in the 1970s or 1980s, her role in Canny Trucking was generally that of a passive investor. *See* Affidavit of Dorothy Conlon ("Debtor's Aff."), sworn to March 29, 1999, at Exhibit B at page 7 (November 9, 1998 Deposition of Debtor).

In addition to her equity interest in Canny Trucking, Debtor was a member of the Canny Family Partnership ("Canny Partnership"), the members of which were the six shareholders of Canny Trucking. The sole asset of the Canny Partnership was a parcel of real property at 618

---

[1] For a discussion of the Court's jurisdiction *see Zube v. Crumb (In Re Conlon)* Adv. No. 96-70234A (Bankr. N.D.N.Y. March 16, 1998).

[2] Pursuant to Local Rule 7056-1 of the Local Bankruptcy Rules for the Northern District of New York, a party moving for summary judgment is required to submit a "short and concise statement of the material facts as to which the moving party contends there is no genuine issue." The party opposing the motion, in turn, is required to submit a counter-statement of material facts as to which it contends a genuine issue exists. Although the Trustee has complied with this rule, Defendant has not. Accordingly, the facts contained in the Trustee's Local Rule 7056-1 statement will be deemed admitted by Defendant for purposes of this motion.

Spring Forest Avenue, Binghamton, New York, which was leased to Canny Trucking as its main terminal.

In 1984 or 1985 David Lindsey ("Lindsey"), an employee of Canny Trucking, approached the four surviving shareholders[3] with a proposal to purchase the company. Debtor has stated that she was receptive to this offer due to her advancing age, and a desire for financial security in retirement. *See* Debtor's Aff. at ¶ 8. At the time, she was unaware of any potential future legal liability arising out of Canny Trucking's pension obligations to its employees. *Id.* at ¶ 7. Similar statements were made in the respective depositions of Barbara Briggs, Joseph Canny, and William Canny. *See* Affidavit of Harvey S. Mars, Esq. ("Mars Aff.") sworn to March 26, 1999, at Exhibit F, ¶ 15 (August 29, 1994 Affidavit of Barbara Briggs); Exhibit G, ¶ 16 (August 30, 1994 Affidavit of Joseph G. Canny); Exhibit J, ¶ 14 (September 15, 1994 Affidavit of William Canny). The purchase offer extended only to the stock of Canny Trucking, and did not include an offer for the terminal owned by the Canny Partnership.

Lindsey's offer was accepted by the shareholders (including the heirs of Hacker and Fletcher), and on April 26, 1985, the parties executed a contract of sale for the shares of Canny Trucking. *See* Debtor's Aff. at Exhibit C (Stock Purchase Agreement). Under the terms of the Stock Purchase Agreement, the selling shareholders received $ 125,000 in cash at the time of closing, in return for which they surrendered 304.99 shares of Canny Trucking's 1,843.99 outstanding shares to Lindsey. The remaining 1,539 shares of stock were simultaneously redeemed by the corporation in exchange for a $625,000 promissory note. This promissory note

---

[3] At a deposition held on November 9, 1998, Debtor stated that Rita Fletcher had died in 1980, and that Mary Louise Hacker had died in or about 1978.

was secured by the 304.99 shares of stock purchased by Lindsey, which were placed in escrow for the duration of the note, with portions of the stock to be released as the note was paid off. The Stock Purchase Agreement provided that Lindsey would have full voting rights for all of the stock as long as Canny Trucking remained current on its obligations under the promissory note. In the event of a default, however, voting power would revert to the former shareholders until such time as the default was cured. *Id.* at 5-6.

Following the sale, Debtor was required to turn over a written resignation as an officer and director of the corporation as of the time of sale. *See* Stock Purchase Agreement at ¶ 14. As a member of the Canny Partnership, however, Debtor continued to receive rental payments from Canny Trucking for its use of the terminal. The terminal, the sole asset of the Canny Partnership, was later sold. Thereafter, the Canny Partnership conducted no further business.

Canny Trucking experienced financial difficulties following its sale to Lindsey, and in September of 1987, it filed for reorganization pursuant to Chapter 11 of the Code in this Court. At the time of its Chapter 11 filing, Canny Trucking faced potential liability to the Trucking Employees of North Jersey Welfare Fund, Inc.-Pension Fund ("Pension Fund") for vested but unfunded pension plan obligations. In December 1987, the Canny Trucking Chapter 11 case was converted to a liquidation under Chapter 7. The Pension Fund accordingly assessed Canny Trucking for its unpaid contributions, notification of which was sent to Canny Trucking in a letter of May 5, 1988, from Michael A. Santaniello, the Executive Director of the Teamsters Local 560 Benefit Funds. In full, that letter provided:

May 5, 1988

Mr. David Lindsey
President

Canny Trucking Company
21 Hackensack Avenue
South Kearny, New Jersey 07032

Dear Mr. Lindsey:

You have previously been notified that you might have a withdrawal liability to the Pension Fund in accordance with the provisions of MPPAA.

The calculations, enclosed herein, indicate that your company does have a withdrawal liability. The legislation provides for a deductible of 3/4 of one percent of the unfunded vested liability or $50,000 if lower. That deductible is gradually phased out for withdrawal liabilities in excess of $100,000.00. Your withdrawal liability after reduction for the deductible, if applicable, is $571,001.00. This withdrawal liability is to be paid in installments of $12,221.00 per month commencing on August 1, 1988. The final payment will be in the amount of $11,148.00 payable on February 1, 1993. These figures include the interest due on the unpaid portions of the liability.

This letter is intended as a demand for payment in accordance with the above schedule.

Within 90 days of receipt of this letter, you have the opportunity to:

1) Ask the Trustees to review any specific matter relating to the determination of your company's liability and payment schedule.

2) Identify any inaccuracy in the determination of the amount of any unfunded vested benefits allocated to our company.

and

3) Furnish any additional relevant information to the Trustees.

However, Section 4219 (b) (2) of ERISA requires that you start making these payments on the date indicated even if the figures are to be challenged. Adjustments will of course be made as required once the challenge is resolved. If you default, the full amount will become payable.

The Trustees reserve the right to look to a parent company or another company under common control with your company if the amounts indicated herein should prove uncollectible from your company.

Should you dispute the foregoing demand you have a right to appeal this decision to arbitration before the New Jersey State Board of Mediation - pension and welfare

panel. This procedure must be followed should any dispute regarding the foregoing exist. All disputes must be resolved within the time period set forth in Section 4211 (a) (1) of the Multiemployer Pension Plan Amendment Act of 1980.

Very truly yours,

</s>
Michael A. Santaniello
Executive Director

Lindsey has stated in an affidavit that he "do[es] not recall" ever receiving the letter from Santaniello. *See* Affidavit of David E. Lindsey ("Lindsey Aff."), sworn to January 9, 1998. Lindsey's Affidavit further states that subsequent to the conversion of the Canny Trucking case to Chapter 7, which took place five months before the demand letter was sent by Santaniello, he left the employ of the company, leaving the Chapter 7 Trustee to collect all records and correspondence. *See* Lindsey Aff. at ¶ 10. Lindsey also stated that he had no recollection of receiving the letter in a 1998 deposition. *See* Mars Aff. at Exhibit P at 69 (December 18, 1998 Lindsey Deposition). After the Pension Fund did not receive its return receipt card back in the mail, the Pension Fund sent a second demand letter to Canny Trucking on August 25, 1989. According to Elizabeth Roberto, an attorney for the Pension Fund, this letter and all subsequent letters were returned as undeliverable. *See* Affidavit of Elizabeth Roberto, Esq. ("Roberto Aff.") sworn to March 26, 1999, at ¶ 2-4.

In addition to its demand letters, the Pension Fund filed a proof of claim in the Canny Trucking bankruptcy in the amount of $161,742.60, as well as a proof of claim for the same amount in Lindsey's subsequent personal bankruptcy. Relying on a provision of MPPAA which allows a plan sponsor to collect withdrawal liability from corporations under "common control"

with judgment-proof employers, *see* 29 U.S.C. § 1301(b)(1), the Pension Fund in 1992 or 1993 also commenced a lawsuit against Reglin Employee Leasing ("Reglin"), a corporation owned by Lindsey's wife. *See* Roberto Aff. at Exhibit D at 12 (December 21, 1998 Roberto Deposition).

Having been unsuccessful in collecting the full amount of the withdrawal liability from Canny Trucking, Lindsey, and Reglin, the Pension Fund commenced a lawsuit against the individual members of the Canny Partnership in the United States District Court for the District of New Jersey. In its complaint, filed on November 30, 1993 ("1993 Complaint"), the Pension Fund alleged the existence of withdrawal liability owing from Canny Trucking, and further alleged that the Canny Partnership was a trade or business under "common control" with Canny Trucking. Although the 1993 Complaint acknowledged the existence of the 1985 stock sale to Lindsey, the Pension Fund alleged that the sale was executed for the principal purpose of evading withdrawal liability, and that the members of the Canny Partnership never relinquished actual control of Canny Trucking. As a result, the Pension Fund sought to recover the unpaid withdrawal liability directly from the Canny Partnership members. *See Canny*, 900 F.Supp. at 587.

In its statement of facts, the Pension Fund's 1993 Complaint made reference in a single paragraph to the withdrawal of "Central Transfer Company." No other mention is made of any company by that name, while the remainder of the complaint discusses the withdrawal and alleged liability of Canny Trucking.[4]

---

[4] In context, the alleged typographical error reads:

> 17. Canny Trucking Co., Inc. filed a petition in bankruptcy on September 21, 1987 in the United States Bankruptcy Court for the Northern District of New York, Case No. 87-11292.

Debtor and the other members of the Canny Partnership were served with the Pension Fund's 1993 Complaint, which was served on Debtor on April 1, 1994. On April 23, 1994, Defendant was hired to represent both Debtor and William Canny in defense of the Pension Fund's 1993 Complaint. On or around the same date, Defendant received a copy of the Pension Fund's 1993 Complaint and held a consultation with Debtor, William Canny, and Debtor's son. *See* Debtor's Aff. at Exhibit A, at ¶ 9 (Affidavit in Support of Partial Summary Judgment). The parties to this adversary proceeding have given slightly different accounts of that meeting. According to Defendant's deposition testimony, he initially identified three possible courses of action that Debtor and William Canny could take: (i) they could move to dismiss the 1993 Complaint; (ii) they could demand arbitration; or (iii) they could move for a change of venue. *See* Mars Aff. at Exhibit N at 46 (July 24, 1997 Deposition of Defendant). Defendant then explained that he believed that a motion to dismiss would be successful, both because of the reference to "Central Transfer Company" in the 1993 Complaint and because of its lack of any indication that the Pension Fund had ever made a formal determination of the Canny Partnership defendants' liability. *Id.* Defendant also stated his belief that if arbitration was requested, that arbitration

---

> 18. Canny Trucking Co., Inc. was a party to and agreed to abide by the terms of collective bargaining agreements between itself and Teamsters Local Union 560, which required that contributions be paid to the Plaintiff.
>
> 19. Pursuant to the terms of the collective bargaining agreements, Canny Trucking Co., Inc. contributed to the Plaintiff Pension Fund on behalf of individuals it employed who were participants in the Plaintiff Pension Fund.
>
> 20. During the course of the bankruptcy case, *Central Transfer Company* discontinued all of its operation under the jurisdiction of the Plaintiff Pension Fund and effectuated a complete withdrawal under 29 U.S.C. §§ 1381 and 1383.

(emphasis added).

would likely be held in New Jersey. *Id.* According to Defendant's affidavit, both Debtor and William Canny "indicated their strong desire not to go to New Jersey, partially due to certain health problems of [Debtor]"and New Jersey's "requirement for interim payments." Ultimately, according to Defendant, Debtor and William Canny decided to retain Defendant "for the express purpose of seeking to dismiss the action or move the venue to Binghamton," but "specifically decided not to pursue arbitration of the claim." *See* Affidavit of Edward Crumb, Esq. sworn to May 3, 1999 at ¶ 5.

In her deposition of November 9, 1998, Debtor stated that she was unable to comprehend the legal issues discussed at her meeting with Defendant. *See* Debtor's Aff. at Exhibit B at 29 (November 11, 1998 Deposition of Debtor). Although she admitted that she expressed a reluctance to go to New Jersey, primarily due to the expense of an overnight hotel stay, she further stated that Defendant told her that the arbitration "wouldn't do us any good." *Id.* at 23.

Based on the decisions reached at this meeting, Defendant filed an Answer and Counterclaim on behalf of Debtor and William Canny on May 20, 1994. This Answer sought dismissal of the 1993 Complaint based on the reference to the Central Transfer Company and further requested a change of venue to the Northern District of New York. The Answer and Counterclaim did not contain any demand for arbitration. *See* Debtor's Aff. at Exhibit G (Answer and Counterclaim of Defendants William A. Canny and Dorothy Conlon).

Although the action was originally commenced in the District of New Jersey, venue was transferred to the Northern District of New York on a motion by Defendant. Following the transfer of the lawsuit to the United States District Court for the Northern District of New York,

the Pension Fund filed an Amended Complaint which alleged, *inter alia*, that by failing to request arbitration within the time period set out by 29 U.S.C. §§ 1399(b)(1) and 1401(a), the Canny Partnership defendants had waived their right to contest their status as a member of the control group or assert a defense of insolvency. On September 9, 1995, the Honorable Thomas J. McAvoy, Chief U.S. District Judge, granted summary judgment against Debtor and her partners jointly and severally. This ruling left Debtor and her partners liable for a judgment that included the principal amount of the withdrawal liability which was $1,221,191.00, accrued interest of $148,549.00, statutory liquidated damages in the amount of $244,238.00 and attorneys fees and costs in the amount of $80,441.79 totaling $1,694,419.79. *See Canny*, 900 F.Supp. at 595-596.

ARGUMENTS

The Chapter 7 Trustee asserts that none of the members of the Canny Partnership or Canny Trucking had received statutory notice of the withdrawal liability prior to the initiation of the Pension Fund's suit against them. *See* Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment at 11. Moreover, the Chapter 7 Trustee alleges, even if Canny Trucking received notice, any notice received by Canny Trucking did not serve as notice to the Canny Partnership. Further, the Chapter 7 Trustee contends, if arbitration had been properly initiated, the Canny Partnership would have at least been entitled to a financial hardship reduction as provided for in 29 U.S.C. § 1405. However, Defendant's failure to pursue arbitration on behalf of Debtor and William Canny foreclosed the possibility of asserting this and other defenses provided for in 29 U.S.C. § 1405 upon initiation of arbitration. As a result, by not

pursuing arbitration, Defendant acted negligently and, therefore, committed malpractice.

To counter the assertion that insufficient notice of the right to arbitrate was given to Debtor, Defendant argues that notice of withdrawal liability was given to David Lindsey, President of Canny Trucking, well before he was retained and that the notice to Canny Trucking was sufficient notice of that liability to the members of the Canny Partnership, including Debtor. Defendant further claims that this notice to Canny Trucking was sufficient because the Canny Partnership is part of the same "control group" as Canny Trucking. It is noted that 29 U.S.C. § 1389 provides that service upon one of the members of the "control group" is effective service upon the "control group." Moreover, Defendant claims that summary judgment is inappropriate in this case because there is a question of fact as to whether or not Lindsey actually received the notice of the withdrawal liability. Finally, Defendant argues that the Chapter 7 Trustee has failed to present any evidence regarding the applicable standard of care, how Defendant violated that standard of care, or the damages allegedly caused by the violation of that standard.

DISCUSSION

In making a determination whether to grant summary judgment, the Court must inquire whether a genuine issue of material fact exists, viewing the evidence presented in the form of the pleadings, interrogatories, admissions on file and affidavits submitted by the parties in the light most favorable to the nonmovant. *See Grain Traders, Inc. v. Citibank, N.A.*, 160 F.3d 97, 100 (2d Cir. 1998). It is the burden of the nonmovant to show specific facts that are in dispute and present a genuine issue for trial. *See Cifarelli v. Village of Babylon*, 93 F.3d 47, 51 (2d Cir.

1996) (citation omitted). "Mere conclusory allegations, speculation or conjecture will not avail a party resisting summary judgment." *Id.* (citation omitted).

To consider the issue of whether the time to demand arbitration had passed, the Court must consider when Debtor received effective notice of the withdrawal liability. In 1980, Congress passed MPPAA. In enacting MPPAA, Congress wished to protect the unfunded vested benefits of participants and beneficiaries in multiemployer pension plans when employers withdrew from those plans. To insure greater stability, Congress held the putative employer immediately liable for its proportional share of unfunded vested benefits. *See Trustees of the Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund v. Rentar Industries, Inc.*, 951 F.2d 152, 153 (7th Cir. 1991), *citing* 29 U.S.C. § 1381 and H.REP. NO. 869, PART I, 96th Cong., 2d Sess. 51-54 (1980). MPPAA allows multiemployer plan sponsors to impose so-called "withdrawal liability" on employers that either completely or partially terminate their participation in multiemployer plans for their proportionate share of unfunded vested benefits. *See* ERISA §§ 4202 and 4213 (c), 29 U.S.C. §§ 1382 and 1393. That liability calculation is based on the employer's date of complete withdrawal from a multiemployer plan. 29 U.S.C. § 1382. Special provisions in MPPAA define when the complete withdrawal of an employer occurs. *See* 29 U.S.C. § 1383. To collect the withdrawal liability from the employer, the sponsor must notify the putative employer of the amount of the employer's alleged withdrawal liability and the schedule for liability payments established by the fund. 29 U.S.C. § 1399 (b)(1). Finally, the sponsor must demand payment from the employer in accordance with the schedule. Pursuant to 29 U.S.C. § 1399 (b)(1)(B), the putative employer has the option of asking the fund sponsor to reconsider the computed alleged liability. MPPAA then

outlines three scenarios which limit the employer's time to initiate arbitration:

> (1) If the employer requests reconsideration of the liability assessment and the plan sponsor responds within 120 days, the employer has 60 days from the response to initiate arbitration proceedings;
> (2) If the employer requests reconsideration and the sponsor does not respond within 120 days, the employer has 180 days from the request for reconsideration; and
> (3) if the employer never requests reconsideration, the employer has 90 days from its first notice of the liability assessment [to initiate arbitration proceedings].

Canny, 900 F.Supp. at 588 n.1, *quoting ILGWU Nat'l. Ret. Fund v. Levy Bros. Frocks, Inc.*, 846 F.2d 879, 882 (2d Cir. 1988).[5]

Regardless of whether the employer decides to request reconsideration, the employer is required to begin making payments under the schedule within 60 days of notice of liability. 29 U.S.C. § 1399 (c)(2).

ERISA requires that all trades or businesses--whether or not incorporated – that are under "common control," as defined in the regulations issued by the Pension Benefit Guaranty Corporation, "shall be treated...as a single employer." 29 U.S.C. § 1301 (b)(1). Because a commonly controlled group of businesses is to be treated as a single employer, each member of such a group is obligated for the withdrawal liability of any other member of the group. *See Canny*, 900 F.Supp. at 589.

Businesses that are under common control fall into two categories and are defined in 26

---

[5] Failure to initiate arbitration within the statutory time period, once there has been notice of liability, operates as a waiver of arbitration, thereby fixing the withdrawal liability and foreclosing any challenge to its imposition. *See Bowers v. Greenpoint Waterhousing and Distribution Services,* 1992 WL 110756, at *2 (S.D.N.Y. May 5, 1992), *citing ILGWU National Retirement Fund v. Levy Bros. Frocks, Inc.,* 846 F.2d 879, 881-82, 887 (2d Cir. 1988).

C.F.R. § 1.414 (c)-2: (i) Parent-subsidiary group of trades or businesses; or (ii) Brother-sister group of trades or businesses.

A business falls into the parent-subsidiary group of trades or businesses under common control if there are one or more chains of organizations conducting trades or businesses connected through ownership of a controlling interest with a common parent organization if:

> (i) A controlling interest in each of the organizations is owned by one or more of the other organizations; and
> (ii) The common parent-organization owns a controlling interest in at least one of the other organizations. 26 C.F.R. 1.414 (c)-2(b).

Further, a controlling interest with respect to a corporation is defined as ownership of at least 80 percent of total combined voting power of all classes of stock entitled to vote of such corporation or at least 80 percent of the total value of shares of all classes of stock of such corporations. *Id*.

Businesses fall into a brother-sister group of trades or businesses under common control if:

> (i) the same five or fewer persons who are individuals, estates, or trusts, own a controlling interest in each organization; and
> (ii) taking into account the ownership of each such person only to the extent such ownership is identical with respect to each such organization, such persons are in effective control of each organization.
> Persons are in effective control of a corporation when such persons own stock possessing more than 50 percent of the total combined voting power of all classes of stock entitled to vote or more than 50 percent of the total value of shares of all classes of stock of such corporation.

26 C.F.R. 1.414(c)-2(b)(2)(c). It is only when the business falls into one of the above categories that service of the notice of withdrawal liability on one member of the group will be considered service on all and, therefore, be considered effective notice of a liability. *See McDonald v.*

Centra, Inc., 946 F.2d 1059, 10062 (4th Cir. 1991) (citations omitted).

Debtor could not have had a Parent-Subsidiary relationship with Canny Trucking. For Debtor, through the Canny Partnership, to have been involved with Canny Trucking in a Parent-Subsidiary relationship, either the Canny Partnership or Canny Trucking would have had to have owned at least an 80 percent interest in the other at the time of the Fund's 1988 letter notice. The only evidence of any ownership interest was that of the six individual shareholders. Although these six shareholders were all members of the Canny Partnership, the partnership entity itself had no interest in Canny Trucking. The six individual shareholders could not possibly have been in a Parent-Subsidiary relationship with Canny Trucking as 26 C.F.R. § 1.414 (c)-2 requires one or more chains of organizations to be connected to the parent company. As the individual shareholders, including Debtor, would not be considered an "organization" within the meaning of the statute, a Parent-Subsidiary relationship could not have existed.

In order for the Canny Partnership to have had a Brother-Sister relationship with Canny Trucking, in 1987 when Canny Trucking completely withdrew from the fund, the same five or fewer persons had to have owned a controlling interest in Canny Trucking and had effective control over Canny Trucking at the time the withdrawal liability accrued. 29 U.S.C. § 1389; *see Rentar*, 951 F.2d at 153 . Although there were six partners, only four were surviving at the time of the accrual of the withdrawal liability. Assuming that this would satisfy the statutory requirement of five or fewer people, Defendant would need to show that those four partners owned a controlling interest, as defined above, and were in effective control of Canny Trucking at the time of the accrual of the withdrawal liability. For these partners to be in effective control, these partners would have to have owned an aggregate of more than 50 percent of the profit

interest or capital interest of Canny Trucking Company. Again, because the stock purchase took place two years before the complete withdrawal of Canny Trucking from the Fund, none of the partners in the Canny Partnership, including Debtor, owned any stock or interest in Canny Trucking at time of the accrual of the withdrawal liability. Accordingly, there was no Brother-Sister between the Canny Partnership and Canny Trucking in May 1988.

Because the Canny Partnership was not in common control with Canny Trucking as defined in 26 C.F.R. § 1.414, the Fund's letter to Lindsey notifying Canny Trucking of its withdrawal liability in May 1988 would be ineffective notice to members of the Canny Partnership, including Debtor. Moreover, the 1988 letter lends some credence to this conclusion. That letter states: "The [Fund's] Trustee reserves the right to look to a parent company or another company under common control with your company if the amounts indicated herein should prove uncollectible from your company." If the Fund's Trustee is reserving the right to look to a parent company or company under common control in the future, that letter suggests the possibility of separate notice to a parent company or company under common control. Therefore, as a matter of law, the 90 day period within which Debtor was required to initiate arbitration began not when Lindsey received the May 5, 1988 letter but when the 1993 Complaint was served on her as this was the first notice that Debtor had of the withdrawal liability.[6]

---

[6] At first glance, this conclusion may appear to be somewhat at odds with Judge McAvoy's prior decision. In that decision, Judge McAvoy found that the Canny Partnership, including Debtor, was an "employer" within the meaning of MPPAA at least just prior to the time the stock in Canny Trucking was transferred to Lindsey. However, he necessarily left open the issue of whether that "employer" status existed at the date the withdrawal liability of Canny Trucking accrued. The District Court specifically observed the latter issue "was relegated to an arbitrator's jurisdiction." *Canny,* 900 F.Supp. at 590. Thus, Judge McAvoy did not foreclose this Court's consideration of that issue which is at the very core of whether or not Defendant committed malpractice in failing to initially advise Debtor of her right to challenge the imposition

Turning to the question of whether Defendant's failure to initiate arbitration on Debtor's behalf during the 90 day period constituted malpractice, the Chapter 7 Trustee must establish, that Defendant failed to exercise that degree of skill commonly exercised by an ordinary member of the legal community and that Debtor incurred damages as a direct result of her attorney's actions. *Marshall v. Nacht*, 172 A.D.2d 727, 727-728, 569 N.Y.S. 2d 113, 114 (N.Y. App. Div. 2nd Dept. 1991), *citing Marquez v. Ross Dev.*, 162 A.D. 2d 1011, 559 N.Y.S.2d 802 (N.Y. App. Div. 4th Dept. 1990). Thus, an action to recover damages for legal malpractice requires a showing of: (1) a duty; (2) a breach of that duty; and (3) proof that actual damages were proximately caused by the breach of duty. *Id., quoting Murphy v. Stein*, 156 A.D. 2d 546, 549 N.Y.S. 2d 53 (N.Y. App. Div. 2nd Dept. 1989).

In New York, an attorney's conduct is governed by the Code of Professional Responsibility which is codified in the New York Judiciary Law. With respect to an attorney's duty to his/her client, Ethical Consideration ("EC") 7-8 states, in relevant part, "A lawyer should advise the client of the possible effect of each legal alternative." *See* Code of Professional Responsibility EC 7-8. Moreover, a client is entitled to all information helpful to his cause within his/her attorney's command.

> If an attorney negligently or willfully withholds from his client information material to the client's decision to pursue a given course of action, or to abstain therefrom, then the attorney is liable for the client's losses suffered as a result of action taken without benefit of those undisclosed material facts.

Spector v. Mermelstein, 361 F.Supp. 30, 39-40, (S.D.N.Y. 1972) *aff'd in part and rev'd on other grounds,* 485 F.2d 474 (2nd Cir. 1973).

---

of withdrawal liability through arbitration.

Whether or not Defendant breached his duty to Debtor with respect to her right to arbitrate her potential withdrawal liability is not an issue that may be resolved by summary judgment. Debtor alleges that Defendant told her arbitration would not do her any good. *See* Debtor's Aff. at Exhibit B at 23 (November 9, 1998 Deposition of Debtor). Defendant asserts he advised Debtor's cousin, William Canny, to demand arbitration prior to transferring the case to the Northern District of New York. *See*, Debtor's Aff. at Exhibit N at 94 (July 24, 1997 Deposition of Defendant). Although Debtor makes various other allegations regarding what was said during her initial visit with Defendant, it is not clear whether she received the same advice. Debtor has provided only a sampling of conclusory allegations with regard to exactly what Defendant told her during their initial consultation. As a result, there remains questions of fact as to what, if anything, was said to Debtor regarding both the timing and the feasibility of arbitration. These questions of fact must be resolved at trial. Therefore, this Court must recommend denial of summary judgment on the issue of Defendant's alleged commission of malpractice.[7]

Based on the foregoing it is hereby

RECOMMENDED to the United States District Court for the Northern District of New York pursuant to 28 U.S.C. § 157 (c)(1):

(1) that as a matter of law, the time within which Debtor was required to demand arbitration had not expired prior to retention of Defendant on April 23, 1994;

---

[7] Furthermore, even if the Court were to conclude that Defendant committed malpractice, the Chapter 7 Trustee could only succeed in this action if he can prove that Debtor's liability would have been reduced or eliminated under 29 U.S.C. § 1401 had Defendant initiated arbitration .

(2) that the Chapter 7 Trustee's motion for summary judgment be denied as to Defendant's liability for malpractice in allegedly failing to advise Debtor of her right to request arbitration; and

(3) that the District Court conduct a trial on the merits to determine whether Defendant committed malpractice, and if it is determined that Defendant did commit malpractice, to determine the amount of damages resulting therefrom.

Dated at Utica, New York

this 30th day of September 1999

_____

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge