UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

JAMES F. GAROFALO, JR. — CASE NO. 95-64467

Debtor — Chapter 7

APPEARANCES:

CAROLYN J. COOLEY, ESQ.
Chapter 7 Trustee
Mayro Building, Room 405
Utica, New York 13501

CARPENTER & CARPENTER, ESQS.
Attorneys for Secured Creditor
Dr. Stan Czaplak
322 North Washington Street
Herkimer, New York 13350

JEFFREY S. CARPENTER, ESQ.
Of Counsel

TODD D. BENNETT, ESQ.
Of Counsel for Carpenter & Carpenter, Esqs.
107 Court Street
Herkimer, New York 13350

JAMES SELBACH, ESQ.
Attorney for Debtor
115 East Jefferson St.
Syracuse, New York 13202

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

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

Presently before the Court is an objection filed on May 15, 1996, by Carolyn J. Cooley, Esq., Chapter 7 trustee ("Trustee") to the proof of claim filed by Dr. Stan Czaplak ("Dr. Czaplak"). The objection was originally scheduled to be heard on June 25, 1996, and was

adjourned on consent of the parties to July 30, 1996. A reply and cross-motion was filed on behalf of Dr. Czaplak on July 24, 1996, seeking recovery of monies being held by the Trustee or, in the alternative, that his claim in the amount of $11,306.50 be held to be secured.

The Court heard oral argument at its regular motion term in Utica, New York, on July 30, 1996, and adjourned the matter to August 27, 1996, to allow the parties an opportunity to file memoranda of law. At the request of the Trustee on August 27, 1996, additional time was provided in order for her to respond to the memorandum of law filed on behalf of Dr. Czaplak. The matter was submitted for decision on September 24, 1996.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. §§1334(b), 157(a), (b)(1), (b)(2)(A), (B), and (O).

FACTS

James F. Garofalo, Jr. ("Debtor") filed a voluntary petition ("Petition") on December 11, 1995, under Chapter 7 of the Bankruptcy Code (11 U.S.C. §§101-1330) ("Code"). In Schedule D attached to the Petition, Debtor listed Dr. Czaplak as holding a secured claim of $12,717.47. Debtor described the claim as a lien against personal injury recovery and indicated that the amount of the lien was disputed.

The last day to file claims in the Debtor's case was April 9, 1996. On February 14, 1996,

Dr. Czaplak filed a proof of claim in the amount of $11,306.50, labeled as "secured" based on an "award from lawsuit" (*see* Exhibit "A" of Trustee's Objection). Attached to the proof of claim is a list of dates on which Dr. Czaplak allegedly rendered chiropractic services to Debtor, beginning September 30, 1993, through August 10, 1995.

On or about February 20, 1995, the Debtor executed what is labeled a "Doctor's Lien" ("Document") in favor of Dr. Czaplak (*see* Exhibit "D" of Dr. Czaplak's Reply). According to the language therein, Debtor authorized Dr. Czaplak to furnish medical information concerning an accident which occurred on September 27, 1993, to Debtor's attorney/insurance carrier, identified as Davoli, McMahon & Kublick, P.C. ("Davoli firm"). The Document also purported to grant a lien to Dr. Czaplak "on any settlement, claim, judgment, or verdict as a result of said accident/illness", and authorized and directed the Davoli firm to withhold any sums due Dr. Czaplak from "such settlement, claim, judgment, or verdict as may be necessary to protect said doctor adequately."

On or about October 12, 1995, a check was issued by Niagara Mohawk Power Corporation ("Niagara Mohawk") in the amount of $31,857.00,[1] payable to "James F. Garafalo, Jr., Davolli [sic] McMahon & Kublick, P.C. as Attys. for Defendant [sic] and Dr. Stan Czaplak" (*see* Exhibit "A" of Dr. Czaplak's Reply). A letter, dated October 16, 1995, which accompanied the check indicates that it is "in satisfaction of the judgment entered and filed in the Onondaga County Clerk's Office on September 27, 1995" in connection with *Garofalo v. Niagara Mohawk* (*see id.*). The check was endorsed by the Debtor, Dr. Czaplak and David McMahon as president

[1]According to a letter dated December 13, 1995 ("December letter") from the Davoli firm and addressed to the Clerk of the Bankruptcy Court, the actual amount received from Niagara Mohawk was $38,857.00.

of the Davoli firm and deposited into the Davoli firm's escrow account ("Escrow Account") on or about November 3, 1995 (*see* Exhibit "A" of Dr. Czaplak's Reply).

According to the December letter from the Davoli firm, after attorneys' fees of $9,461.66 and disbursements of $11,472.02, there remained $18,923.32 in its Escrow Account. Allegedly, the Davoli firm filed a motion in state court seeking a determination of the proper distribution of the remainder of the proceeds which was returnable on December 12, 1995. The motion was stayed as a result of the filing of the Debtor's Petition on December 11, 1995. At the hearing on July 30, 1996, Trustee acknowledged that she was holding $18,923.32, which had been turned over to her by the Davoli firm.

ARGUMENTS

Trustee asserts that there is no statutory or common law basis for a doctor's lien and, therefore, Dr. Czaplak's claim is not entitled to secured status. Dr. Czaplak contends that the funds included payment for medical services he rendered to the Debtor. Dr. Czaplak asserts that a lien was created by agreement of the parties and memorialized by the Document executed by the Debtor on February 20, 1995. In the alternative, Dr. Czaplak makes the argument that the monies should not be considered part of the Debtor's estate since Dr. Czaplak was one of the payees on the check.

DISCUSSION

Whether or not a lien exists is a matter of state law. *In re Taddeo*, 9 B.R. 299, 305 (Bankr. E.D.N.Y.) (citation omitted), *aff'd* 15 B.R. 273 (E.D.N.Y. 1981), *aff'd* 685 F.2d 24 (2d Cir. 1982). The New York State Legislature has provided a statutory lien upon the proceeds of a recovery in a tort action to both hospitals (New York Lien Law ("NYLL") §189) and attorneys (New York Judiciary Law ("NYJL") §475). However, "[t]here is no lien, common-law or statutory for a doctor's medical services." *Marsh v. LaMarco*, 75 Misc. 2d 139, 143, 351 N.Y.S.2d 253 (N.Y. Sup. 1973) (citations omitted), *aff'd* 46 A.D.2d 888, 361 N.Y.S.2d 691 (N.Y.A.D. 2d Dept. 1974); *aff'd sub nom. Baker v. Sterling*, 39 N.Y.2d 397, 348 N.E.2d 584, 384 N.Y.S.2d 128 (N.Y. 1976). The courts, instead, have indicated that protection of claims for medical services "is usually obtained through an assignment of the proceeds of the tort settlement." *Id.* (citation omitted); *see also Aiello v. Levine*, 44 Misc. 2d 1067, 1068, 255 N.Y.S.2d 921, 922 (N.Y.Dist.Ct. 1965) ("In the absence of agreement, a physician, unlike a hospital does not have a lien on the proceeds of a settlement or recovery in a tort action." (citations omitted)).

Between the time the Debtor executed the Document and the time the judgment was allegedly entered in the state court action, there was no "legal" assignment in existence in favor of Dr. Czaplak since the lawsuit commenced by the Debtor in state court had not "ripened into a judgment." *Richard v. Nat'l Transp. Co., Inc.*, 158 Misc. 324, 326, 285 N.Y.S. 870 (N.Y.Mun. Ct. 1936). Until the judgment was entered, the only thing that could have existed was an "equitable" assignment of a right to a portion of the prospective proceeds from any judgment award. *Id.*; *see also In re Duty*, 78 B.R. 111, 114 (Bankr. E.D.Va. 1987) (stating that '[a]n assignment for value of a future right, such as money to be acquired in the future, is an equitable

assignment."); *In re Kleckner*, 93 B.R. 143, 148 (N.D.Ill. 1988) (indicating that "an equitable assignment is such an assignment as gives the assignee a title, which though not cognizable at law, equity will recognize and protect.").

However, it is important to note that under New York law, an agreement "to pay a debt out of a designated fund does not operate to create an equitable lien upon the fund, or operate as an equitable assignment thereof." *Leon v. Martinez*, 193 A.D.2d 788, 791, 598 N.Y.S.2d 274 (N.Y.A.D. 2d Dept. 1993), *aff'd* 84 N.Y.2d 83, 638 N.E.2d 511, 614 N.Y.S.2d 972 (1994), citing *Datloff v. Turetsky*, 111 A.D.2d 364, 365 (N.Y.A.D. 2d Dept. 1983) (citations omitted). Indeed, with respect to the cases addressing equitable assignments to hospitals and or attorneys, generally, there was no debt in existence at the time the assignment was executed. *See e.g. Kleckner*, 93 B.R. 143; *Duty*, 78 B.R. 111; *In re Musser*, 24 B.R. 913 (W.D.Va. 1982); *Richard v. Nat'l Transp. Co., Inc.*, 158 Misc. 324. In those cases, the assignment was executed in anticipation of a debt what would arise as a result of either medical or legal services being rendered by the assignee.

At the time the Debtor executed the Document on February 20, 1995, a debt of approximately $11,705 was allegedly already owed to Dr. Czaplak for services rendered following the accident.[2] Under New York law, no lien was created with respect to the debt owed as of that date.

According to the list of services rendered by Dr. Czaplak and attached to his proof of

---

[2]Although the list of visits attached to Dr. Czaplak's proof of claim indicates one initial visit with a charge of $435 and 124 follow-up visits at a rate of $95 per visit, only 118 visits are actually identified, 87 of which occurred up to and including the date the Document was executed.

claim, he also provided services to the Debtor on 31 occasions following the execution of the Document for which he allegedly received no payment.[3] Under New York law, a lack of consideration will not negate the effect of an assignment that is in writing and signed by the assignor. New York General Obligations Law §5-1105. However, with respect to an equitable assignment arising out of a future right, there must be valuable consideration given in exchange. *Fairbanks v. Sargent*, 117 N.Y. 320, 328, 22 N.E. 1039 (1989). The question arises whether consideration was given by Dr. Czaplak for the assignment as to any future services he might render to the Debtor.

In this case, the Document indicates that it was made "in consideration" of Dr. Czaplak awaiting payment. However, there is nothing in the Document reflecting any agreement signed by Dr. Czaplak indicating that in exchange for the assignment of any settlement or judgment he promised to forbear from taking any action to collect from the Debtor. Indeed, the language in the Document indicating that payment be made to Dr. Czaplak of "such sums as may be due and owing him for service rendered me" is ambiguous in that it is not clear whether it is limited to services rendered up to the time that the Document was signed and, therefore, as discussed above, ineffective in creating a valid equitable assignment, or whether it included any future services that might be rendered up until the time of any settlement or judgment. The Document does state that the Debtor was ultimately responsible for paying Dr. Czaplak regardless of the outcome of the personal injury action.

Based on the above, the Court must conclude that in light of the ambiguous language of the Document as to services rendered subsequent to its execution and in the absence of any

---

[3]Total charges for these visits amount to $2,945 ($95 X 31).

promise from Dr. Czaplak, there was no valuable consideration supporting an equitable assignment with respect to the services rendered by Dr. Czaplak after the Document was executed. Therefore, Dr. Czaplak is not a secured creditor but at the least has a general unsecured claim against the Debtor.

Dr. Czaplak also makes the argument that even if the Court were to conclude that he does not have a secured claim, he still is entitled to the monies being held by the Trustee under the theory that the monies are not property of the estate. He contends that as a named payee on the check, a portion of the monies which were subsequently deposited into the escrow account of the Davoli firm belonged to him, not the Debtor. It is his argument that $11,306.50, plus interest, does not constitute property of the estate and, therefore, the Trustee should be required to turn over those monies to him.

The trustee in bankruptcy succeeds only to those rights in property possessed by the debtor at the time the petition was filed, whether legal or equitable. *Bank of Marin v. England*, 385 U.S. 100, 101, 87 S.Ct. 274, 276 (citation omitted). In this case, the monies which Dr. Czaplak asserts were never property of the estate were on deposit in the Escrow Account of the Davoli firm at the time Debtor filed his Petition. The check issued by Niagara Mohawk named the Debtor, the Davoli firm and Dr. Czaplak as co-payees. Dr. Czaplak acknowledges having endorsed the check in anticipation of receiving payment for his services.

By endorsing the check, Dr. Czaplak, as well as the other co-endorsees, warranted that they had good title to the instrument and that each was authorized to receive payment. *See* New York Uniform Commercial Code §3-417(2). There have been no allegations that any endorsements were forged and, therefore, presentment of the check was proper and resulted in

the check's negotiation and ultimate deposit into the Escrow Account.

Pursuant to NYJL §475, the Davoli firm had a lien on said monies and was entitled to recover attorney's fees and costs and disbursements from the proceeds. Allegedly, $9,461.66 in attorneys' fees and $11,472.02 in costs and disbursements was withdrawn from the account prepetition, leaving a balance of $18,923.32. Under New York Debtor and Creditor Law §282(3)(iii), a debtor is permitted to exempt property that is traceable to a payment, not to exceed $7,500 on account of personal bodily injury. According to the Debtor's Petition, the Debtor has claimed this exemption and apparently the Trustee has not objected to it. If there had been a settlement of the Debtor's personal injury action the monies deposited into the Escrow Account would have created only an equitable interest in said funds in the Debtor until all conditions had been performed under the terms of the settlement. *In re Pless*, Ch. 7 Case No. 96-61287, slip op. at 5 (Bankr. N.D.N.Y. Sept. 9, 1996), citing *In re O.P.M. Leasing Services*, Inc., 46 B.R. 661, 667 (Bankr. S.D.N.Y. 1985). The fact that the monies deposited into the Escrow Account were based on a judgment following a trial in the state court should not change this interest or that of the Trustee to the monies in the Escrow Account. If, as the parties have alleged, no other entities have claimed an interest in the monies, then the Debtor should at a minimum be entitled to exempt $7,500 given that the Trustee has filed no opposition to the exemption. This amount is less than the difference between the $18,932.32 held by the Trustee and the $11,306.50 claimed by Dr. Czaplak.

With respect to the amount claimed by Dr. Czaplak, the Court has been presented with conflicting information regarding the monies awarded by the jury and subsequently paid by Niagara Mohawk. This is not a situation where the check was issued only to the Debtor and Dr.

Czaplak's only rights were based on an assignment by the Debtor. As discussed above, as co-payees on the check, both the Debtor and Dr. Czaplak warranted that they held good title to the funds represented by the check upon endorsing the check. The question left for final determination is the extent of that title after the deduction for attorneys' fees and costs and disbursements by the Davoli firm based on its statutory lien. The Court has made certain calculations based on the information presented to it (*see* Addendum A) which should provide guidance to the parties in any subsequent distribution consistent with this decision.

Based on the foregoing, it is hereby

ORDERED that Trustee's motion disallowing Dr. Czaplak's claim in the amount of $11,306.50 as secured is granted; it is further

ORDERED that Dr. Czaplak's cross-motion seeking turnover of $11,306.50, plus interest, is denied; and it is further

ORDERED that the Trustee turnover $6,528.54 to Dr. Czaplak within 30 days of the date of this Order unless a motion, along with supporting documentary evidence, is filed with the Court and served the parties herein disputing the assumptions and calculations of the Court as set forth in Addendum A, attached to this Order.

IT IS SO ORDERED.

Dated at Utica, New York

this 11th day of December, 1996

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge

ADDENDUM A

According to the jury verdict (*see* Exhibit "C" of Dr. Czaplak's Rely with Cross-Motion), an award of damages was made in the following allocations:

Past Pain and Suffering	$ 6,672.25
Past Medical Bills	26,127.75
Past Lost Earnings	7,200.00
Future Medical Bills (2 yrs.)	20,000.00
Future Lost Earnings (2 yrs.)	15,000.00
	$ 75,000.00

These monies, if Niagara Mohawk had been found to be entirely at fault, would have been allocated for distribution as follows prior to the payment of attorney's fees and costs and disbursements:

TRUSTEE

Past Pain and Suffering	$ 6,672.25
Future Medical Bills	20,000.00
	$26,672.25 (35.5% of $75,000)

DR. CZAPLAK

Past Medical Bills	$26,127.75 (34.5% of $75,000)

DEBTOR

Past Lost Earnings	$ 7,200.00
Future Lost Earnings	15,000.00
	$22,200.00[4] (30% of $75,000)

Niagara Mohawk was actually found to be 40% at fault. Therefore, the Court calculates that Niagara Mohawk was required to pay approximately $30,000 (40% X $75,000). The check issued by Niagara Mohawk was in the amount of $31,857.00. Yet, according to the Davoli firm it received $38,857.00 as a result of the jury verdict (*see* Exhibit "A" of Dr. Czaplak's Rely with Cross-Motion). The Davoli firm also indicates that its attorneys' fees were $9,461.66 in connection with the matter, and costs and disbursements amounted to $11,472.02 (*see* Exhibit "B" of Dr. Czaplak's Rely with Cross-Motion). The Court can only hypothesize as to the accuracy of these figures. Therefore, for purposes of clarifying its position, the Court will accept that $18,923.32, the amount held by the Trustee, is the amount to be distributed after the payment of attorneys' fees and costs and disbursements according to the same percentage allocations as above:

TRUSTEE	35.5% x $18,923.32	$ 6,717.78
DR. CZAPLAK	34.5% x $18,923.32	6,528.54
DEBTOR	30.0% x $18,923.32	5,677.00
		$18,923.32

[4]The Trustee did not object to the exemption claimed by the Debtor pursuant to NYD&CL §282(3)(iii). However, the Court observes that NYD&CL §282(3)(iii) does not include an exemption for pain and suffering or compensation for actual pecuniary loss. It would appear that Debtor's exemption is more appropriately asserted pursuant to NYD&CL §282(3)(iv) with respect to compensation of loss of future earnings to the extent reasonably necessary for debtor's support.