UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

ALBERT W. LAWRENCE — CASE NO. 97-11263

Debtor

IN RE:

BARBARA C. LAWRENCE

Debtor — CASE NO. 97-11258

APPEARANCES:

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

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

Currently before the Court is the January 24, 2001 motion filed by attorneys Gleason, Dunn, Walsh & O'Shea ("Gleason") seeking the return to the Court of certain settlement

proceeds disbursed from the bankrupt estate of Albert W. Lawrence ("Debtor") to creditor Sharon Burstein ("Burstein") pending the outcome of an apparent attorneys' fee dispute between Burstein and Gleason. On January 24, 2001, U.S. Bankruptcy Judge Robert E. Littlefield, Jr. enjoined disbursement of the proceeds to Burstein and ordered that they be held in the escrow account of Burstein's current attorneys, Fernandez, Burstein & Tuczinski ("FBT") until further Court order.

Burstein filed opposition to Gleason's motion on January 31, 2001 ("Declaration of Richard L. Burstein") and Gleason filed reply memoranda on February 1, 2001 ("Reply Declaration of George F. Carpinello" and "Reply Affidavit of Mark T. Walsh of Gleason, Dunn, Walsh & O'Shea").

At a February 1, 2001 status conference on Gleason's pending motion, Judge Littlefield indicated a potential conflict with a party in interest, suggested the motion be brought before another court and continued the January 24, 2001 restraining order until such time as the motion could be heard by another court. On February 7, 2001, Gleason filed an Order to Show Cause before this Court accompanied by the aforementioned supporting memoranda as well as the Supplemental Declaration of George F. Carpinello dated February 5, 2001.

Oral argument was heard before this Court at a motion term held in Utica, New York on February 13, 2001. At oral argument, the parties mutually indicated their desire to enter into a negotiated consent order whereby the matter would be removed to state court for resolution on the merits. Following oral argument, the parties were afforded the opportunity to submit a proposed consent order within one week, after which time if no consent order was agreed upon, the Court would take the matter under submission for decision. By correspondence dated

February 22, 2001 and February 23, 2001, the parties respectively indicated that a consent order had not been agreed upon and that the matter should be taken under submission for decision.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to determine whether subject matter jurisdiction exists pursuant to 28 U.S.C. § 1334(b) and 28 U.S.C. § 157(a) & (b).

FINDINGS OF FACT

In November 1996, Burstein, through her attorneys Gleason, obtained a pre-petition judgment against the Debtor, Albert Lawrence, among others, in the amount of $502,619.[1] *See In re Lawrence*, Ch. 11 Case Nos. 97-11263 and 97-11258, slip op. at 1 (Bankr. N.D.N.Y. December 22, 2000, Littlefield, J.). On January 27, 1997, $200,000 of the judgment was allegedly paid to Gleason who, in turn, remitted the same to Burstein less Gleason's one-third contingency fee. *See* Reply Affidavit of Mark T. Walsh, at ¶¶ 11, 12 and Exhibit C. The balance of the judgment was allegedly not satisfied before Albert Lawrence filed for protection under Chapter 11 of the U.S. Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code") on February 28, 1997. From the facts alleged, it appears that Gleason was then either discharged or withdrew as Burstein's counsel, but retained an attorney's charging lien on the balance of Burstein's judgment representing the remaining fees allegedly owed to Gleason. *See* Declaration of Richard L.

[1]The judgment was entered against "Albert W. Lawrence, Lawrence Insurance Group, Inc. and Lawrence Group, Inc., jointly and severally." *See In re Lawrence*, Ch. 11 Case Nos. 97-11263 and 97-11258, slip op. at 1 (Bankr. N.D.N.Y. December 22, 2000, Littlefield, J.).

Burstein, at ¶¶ 5, 8, 9; Declaration of George F. Carpinello, at ¶¶ 2,3. *See also*, N.Y. JUD. LAW § 475.

Burstein then retained attorney Marc Ehrlich ("Ehrlich") to represent her interest in the Debtor's bankruptcy case. After an apparent negotiated settlement between the § 1104 Trustee for the estate of Albert Lawrence and Ehrlich, an Order was entered on December 22, 2000, by Judge Littlefield providing for a payment to Burstein in the sum of $228,000 in satisfaction of the judgment against the estate of Albert Lawrence only.[2] *See In re Lawrence*, *supra*, slip op. at 2. The Order further provided that Burstein shall assign whatever remaining interest she had in the state court judgment to the Debtor's estate. *See id.* at 2. Ehrlich allegedly received the funds sometime thereafter, retained $17,500 (apparently as fees & costs associated with his representation of Burstein) and remitted $29,000 to Burstein directly. *See* Declaration of George F. Carpinello, at ¶¶ 2, 6. It is alleged that Ehrlich was subsequently discharged as counsel for Burstein at which time Ehrlich remitted the remaining funds to FBT where those funds are presently being held in the firm's escrow account. *See id.* at ¶¶ 5,6.

On January 18, 2001, Gleason allegedly learned of the settlement and Judge Littlefield's Order of December 22, 2000 at which time Gleason sought to determine the whereabouts of the funds and additionally sought protection of its alleged charging lien. *See id.* at ¶¶ 5, 6, 7, 8. On January 24, 2001, upon application of Gleason, an Order was entered by Judge Littlefield enjoining disbursement of the funds from FBT's escrow account until further order of the Court. *See In re Lawrence*, Ch. 11 Case Nos. 97-11263 and 97-11258, temporary restraining order

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[2]It appears that the settlement proceeds were derived from the liquidation of a portion of the Debtor's real estate holdings at Lake George, New York.

(Bankr. N.D.N.Y. January 24, 2001, Littlefield, J.). At a status conference held on February 1, 2001, Judge Littlefield indicated his intention to recuse himself from the matter for reasons not entirely clear from the record. *See In re Lawrence*, Ch. 11 Case Nos. 97-11263 and 97-11258, Transcript of Continued 105 Status Conference (Bankr. N.D.N.Y. February 1, 2001, Littlefield, J.). At that conference Judge Littlefield suggested that Gleason "present [its] papers to Judge Gerling, a State Court Judge, appropriate jurisdiction, whatever it is you want to do to resolve this matter" and continued the January 24, 2001 Order until such time as Gleason was heard before a court of competent jurisdiction. *Id.* at 8. At that time, counsel for Gleason indicated that Gleason would "drop any bankruptcy proceeding..." if FBT would consent in writing to hold $93,000 in escrow until the charging lien dispute was resolved in state court. *Id.* at 21

On February 7, 2001, this Court granted Gleason's application for an Order to Show Cause continuing Judge Littlefield's January 24, 2001 Order until such time as the parties could be properly heard before this Court. The relief sought by Gleason at that time was return of the entire $280,000 settlement to the Court to be held in escrow until the charging lien dispute was resolved in state court. On February 13, 2001, oral argument was heard following the Court's regular motion term in Utica, New York. At that time, counsel for Gleason indicated that the only relief sought in this Court was the return of the settlement proceeds to the Court to be held in escrow until the fee dispute was settled. In this regard, counsel for Gleason contended that it had no intention of pursuing the merits of the fee dispute before this Court, rather, the intent is to have the merits of the charging lien fee dispute adjudicated in New York State Supreme Court. To this end, counsel for Gleason and FBT tentatively stipulated on the record that if FBT held the sum of $96,300 in escrow until such time as a state court action was commenced, that no

further intervention of this Court would be sought. The Court provided the parties one week to consult with their respective clients regarding this proposed stipulation and to submit a proposed Order to the Court memorializing the stipulation which, in effect, continued Judge Littlefield's January 24, 2001 Order until such time as a state court action was commenced.

On February 22, 2001, rather than the proposed order, this Court received correspondence from counsel for Gleason indicating that FBT had interposed additional conditions not agreed to at the February 13, 2000 hearing and requested that the Court rule on the pending motion. In response, FBT indicated to the Court via correspondence dated February 23, 2001, that the additional conditions referred to by Gleason's counsel was the imposition of a time limit within which FBT felt was reasonable for Gleason to commence a state court action as well as capping Gleason's potential recovery to the agreed-to sum of $96,300. Finally, by letter dated February 26, 2001, Gleason's counsel indicated to the Court that Gleason will not consent to the limitations requested by FBT and it is assumed, by reference to Gleason's January 22, 2001, that the parties seek a determination by this Court.

ARGUMENTS

Gleason argues that it has a valid attorney's charging lien on the settlement proceeds held by FBT and that the bankruptcy court has jurisdiction over this matter since the failure of its lien to be satisfied subjects the Debtor's estate to liability. *See* Declaration of George F. Carpinello, at ¶¶ 3, 9-10 ("Under well established New York law, a satisfaction obtained from a judgment creditor for the payment of funds without satisfaction of the underlying attorneys' liens is

voidable and the judgment debtor is liable for the full amount of the lien claim."). Gleason contends that it was left out of negotiations prior to Judge Littlefield's December 22, 2000 Order and was thus unable to negotiate for the satisfaction of its lien against Burstein's judgment. *See id.*, at ¶ 4.

FBT argues that Gleason's motion is meritless for several reasons. First, FBT argues that since no written retainer agreement was signed by Burstein, that there is nothing to evidence a lien on the underlying judgment. *See* Declaration of Richard Burstein, at ¶¶ 4(E), 7, 15. Second, FBT contends that when the Debtor filed his bankruptcy petition that Gleason requested permission to withdraw from representing Burstein since they may have had adverse interests in the Debtor's case. *See id.*, at ¶¶ 4(F), 9. FBT contends that Burstein agreed to release Gleason on the stipulation that Burstein owed no further obligation to Gleason, thereby constituting a waiver of any claim Gleason might have to the state court judgment. *See id.*, at ¶¶ 9,15. Third, FBT maintains that because of the adverse position Gleason took against Burstein in the Debtor's case, that Gleason actually hindered the satisfaction of the judgment and should therefore be precluded from sharing in the judgment. *See id.*, at ¶¶ 14. Fourth, FBT contends that the only claim that Gleason could pursue would be under a theory of quantum meruit. *See id.*, at ¶16. FBT contends that any quantum meruit claim must fail since when Burstein agreed to discharge Gleason, the terms were such that the parties were no longer obligated to one another. *See id.* Fifth, FBT contends that Gleason and/or their attorneys were aware of settlement negotiations for many months prior to Judge Littlefield's settlement Order, thus, any prejudice resulting from the negotiated settlement is of their own accord. *See id.*, at ¶¶ 16-33, 37. Finally, FBT contends that bankruptcy court lacks jurisdiction since this is a fee dispute between two creditors not

involving the Debtor or estate property. FBT maintains that "[t]his Court has no jurisdiction to determine the rights of an alleged creditor of a creditor who is not a debtor before this Court." *Id.*, at ¶ 38.

DISCUSSION

As a threshold matter, the parties dispute whether the bankruptcy court has jurisdiction to determine and enforce the extent and validity of an attorney's charging lien on a creditor's settlement with the bankrupt estate. The jurisdiction of this Court, "although broad, is limited to matters 'arising in', 'arising under' or 'related to' a case filed under the Bankruptcy Code." *See In re Gucci*, 193 B.R. 417 (Bankr. S.D.N.Y. 1996, Gallet, J.), *citing Celotex Corp. v. Edwards*, 514 U.S. 300 (1995). The Bankruptcy Court has no jurisdiction over causes of action that do not pose a significant connection to the bankrupt estate. *See In re Gucci*, 193 B.R. at 419 *citing Nemsa Establishment, S.A. v. Viral Testing Systems Corp.*, 1995 WL 489711 *3 (S.D.N.Y. 1995), *quoting Turner v. Ermiger (In re Turner)*, 724 F.2d 338, 341 (2d Cir. 1983). It has been held that the Bankruptcy Court has no jurisdiction over a charging lien dispute between a settling creditor of a debtor's bankrupt estate and that creditor's attorney. *See In re Gucci*, 193 B.R. 417; *Schacter v. Elghanian (In re West 57th Street Concrete Corp.)*, 1996 WL 706931 (S.D.N.Y. 1996, Chin, J.).

The facts of *In re Gucci,* quoted *supra,* are similar to those presented in the instant motion. *See In re Gucci*, 193 B.R. 417. In that case the law firm, Donovan Leisure Newton &

Irvin ("Donovan"), moved in bankruptcy court for an order imposing a charging lien on the proceeds to be paid to its alleged client, a creditor of the estate, by the debtor pursuant to a proposed stipulation of settlement. *See id.* The Donovan firm alleged that it represented the creditor in the debtor's chapter 7 bankruptcy case in a different district as well as the pending chapter 11 in the Southern District of New York. *See id.* Donovan alleged that its charging lien arose as the result of it obtaining settlements on behalf of the creditor in each of the bankruptcy cases. *See id.* The creditor argued, much akin to Burstein's argument in the instant motion, that she never formally retained Donovan, that she never agreed to the billing rates Donovan alleges it was owed, that the Donovan firm did not obtain the settlements for her because she discharged them the year before and that the only reason she was involved with the Donovan firm in the first place was because of a recommendation by her previous attorney. *See id.* The Court held that "[i]n essence, Donovan['s]...motion to impose a charging lien is a matter concerning a creditor of the debtor and a third party...[and]...does not arise in or under Title 11 and is not a core proceeding. It does not involve a substantial right provided by Title 11 nor is it a proceeding that could arise only in the context of a bankruptcy case...Donovan['s]...claim for a charging lien, on [the creditor's] settlement with the debtor, will not affect the debtor's estate or the administration of his estate or any creditor's rights to the distribution of proceeds of the debtor's estate." *See id.* at 20; *see also, Schacter*, 1996 WL 706931 (same); *Gordon v. Shirley Duke Assoc., Inc. (In re Shirley Duke Assoc.)*, 611 F.2d 15 (2d Cir. 1979) (holding that under the Bankruptcy Act that the Bankruptcy Court has jurisdiction over creditor's dealings with the debtor, but has no jurisdiction over a creditor's dealings with third parties). *But see, In re Ralph Lauren*

Womenswear, Inc., 204 B.R. 363, 372 (Bankr. S.D.N.Y. 1997, J. Brozman)[3] (holding that "[t]he bankruptcy court has jurisdiction over the enforcement of this [attorney's charging] lien because the proceeds of the settlement are from the debtor's estate and because the bankruptcy court has jurisdiction over the original dispute which gave rise to the lien.") (citations omitted); *In re Pathe News, Inc.*, 276 F.Supp. 670 (S.D.N.Y. 1967) (holding that under the Bankruptcy Act, the Bankruptcy Court had jurisdiction to enforce an attorney's charging lien arising as a result of the prosecution of a proof of claim in that bankruptcy case), *questioned in Schacter*, 1996 WL 706931, *2 ("*In re Pathe News*, however, was decided almost twenty years before *Celotex* and its holding directly contradicts the test for bankruptcy subject matter jurisdiction enunciated in *Celotex* and by this circuit in *In re Cuyahoga Equipment*. The court's decision in *Pathe News* is directly at odds with the Supreme Court's edict in *Celotex* that 'bankruptcy courts have no jurisdiction over proceedings that have no effect on the debtor.')(citations omitted)

On the instant motion there appears to be no nexus between the charging lien dispute and the bankrupt estate. In this regard, Gleason's counsel would have this Court understand "well established" New York law as allowing an attorney a choice of defendants against whom it

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[3]It should be noted that while Judge Brozman's decision in *Ralph Lauren* specifically dissents from Judge Gallet's view in *Gucci*, it nonetheless supports a finding that this Court lacks jurisdiction to hear the instant motion. In *Ralph Lauren*, the attorney sought a charging lien on the settlement of a $2 million administrative claim ***litigated in bankruptcy court***. *See In re Ralph Lauren Womenswear, Inc.*, 204 B.R. at 371. Judge Brozman retained jurisdiction over the charging lien dispute between the estate creditor and the creditor's attorney primarily because the original dispute which gave rise to the lien was properly heard in bankruptcy court; a fact which Judge Brozman was careful to point out. *See id.* at 372-373 ("I approved the settlement agreement ***and presided over the dispute which gave rise to the proceeds***. The exercise of jurisdiction is therefore appropriate.")(citations omitted). *See generally, Cassirer v. Invex, Ltd. (In re Schick)*, 215 B.R. 13 (Bankr. S.D.N.Y. 1997)(reaching the merits of attorney's charging lien dispute only because dispute arose in bankruptcy court).

wishes to prosecute its charging lien claim. To this end, Gleason's attorneys rely on *Peri v. New York Central & Hudson R.R. Co.*, 152 N.Y. 521, 46 N.E. 849 (1897) and *Morgan v. Drewry,* 3 Misc.2d 440, 150 N.Y.S.2d 897 (1956), respectively.[4] The respective holding in those cases is not, as Gleason's counsel suggests, that any settling defendant is liable to the plaintiff's attorney to the extent of the charging lien on the settlement proceeds. To the contrary, both of those cases were very fact specific and held that, in the interest of equity, if the parties settle the plaintiff's claim in disregard of the plaintiff's attorney's charging lien "to the prejudice of the plaintiff's attorney, ***by reason of the insolvency of his client or for other sufficient cause***, the court will interfere, and protect its officer by vacating the satisfaction of judgment, and permitting execution to issue for the enforcement of the judgment to the extent of the lien, ***or by following the proceeds in the hands of third parties, who received them before or after judgment impressed with the lien***." *Peri*, 152 N.Y. at 525, 46 N.E. 849, 850 (emphasis added); *see also,*

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[4]The Court notes that case *Rubin & Rothman v. McNelis*, relied upon by Gleason's counsel, was a one page default order by the New York State Supreme Court, Appellate Division, Second Department that is so vaguely written that it can barely be gleaned from that decision which party was represented by the attorney seeking to enforce his charging lien. *See Rubin & Rothman v. McNelis*, 130 A.D.2d 643, 515 N.Y.S.2d 572 (2d Dep't 1987). In addition, Gleason's attorneys cite *Lopez v. City of New York* for the proposition that an attorney's charging lien "must be honored even if the defendant did have actual notice of the lien." *See* Reply Declaration of George F. Carpinello, at 2 n.1. In *Lopez*, the plaintiff's attorney settled with the defendant, paid his client, less his fee, where upon his client left the country and the defendant, the City of New York Parking Violations Bureau, stopped payment on the settlement check after discovering an outstanding judgment against the plaintiff. *Lopez v. City of New York*, 152 Misc.2d 817, 818 (Sup. Ct. Bronx Cty. 1991). The Court held that the City did not have the right to a setoff in the amount of the plaintiff's pre-existing judgment since the attorney's charging lien was superior in priority to the City's judgment. *See id.* The aforementioned quote by Gleason's counsel is taken out of context in that the charging lien must be "honored" in the sense that it is not subject to any claims of priority by other judgment creditors of the plaintiff. *See id.* It should also be noted that neither of these cases were considered by either the District Court in *Schacter*, *supra*, or the Bankruptcy Court in *Gucci*, *supra*.

Morgan, 3 Misc.2d at 442, 150 N.Y.S.2d 897, 899. Both *Peri* and *Morgan* involved settling plaintiffs who, upon settlement, left the country and the presumption, generally, was that the settling defendant, whose assets were still within the jurisdiction, retained enough from the settlement to satisfy the charging lien and but for the lien's execution against the defendant, the attorneys would not have been paid for their services. *See Morgan v. Drewry*, 3 Misc.2d at 443, 150 N.Y.S.2d 897, 900 ("It may be pointed out that in those cases where the court refused to enforce a lien against defendant...there was a fund within the jurisdiction of the court sufficient to satisfy the attorney's fee.) In the instant contested matter, not only are the assets of the movant's former client within this jurisdiction and available for execution, but the actual funds in question remain, pursuant to an Order of this Court, intact in FBT's escrow account.[5]

What is evident from the posture of the instant motion is that Gleason seeks to use this Court as its *de facto* escrow agent until such time as it either negotiates a settlement with Burstein or decides to prosecute a state court claim to enforce its charging lien. All parties to the instant motion concur that the merits of this charging lien dispute properly lie within the jurisdiction of the New York courts. It seems clear to both the parties and this Court that this is a dispute between a creditor of the estate and her former attorney. *See In re Gucci*, 193 B.R. at 420. This matter does not arise in or under Title 11, is not a core proceeding, nor is it any way related to the estate. *See id.* The relief sought "does not involve a substantial right provided by Title 11 nor is it a proceeding that could arise only in the context of a bankruptcy case..." *Id.* As such, the relief requested is outside the scope of this Court's subject matter jurisdiction.

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[5]Pursuant to correspondence dated February 15, 2001 from counsel for Burstein to counsel for Gleason, $93,000 remains to date in the FBT escrow account.

By virtue of the foregoing, it is hereby,

ORDERED that the January 24, 2001 Order of Hon. Robert E. Littlefield, Jr., U.S.B.J. and the February 7, 2001 Order of this Court are hereby vacated for lack of subject matter jurisdiction; and it is further,

ORDERED that this Order shall take effect no sooner that forty-eight hours following its entry.[6]

Dated at Utica, New York

this 12th day of March 2001

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge

[6]This Court is cognizant of the significant prejudice to the enforcement of Gleason's alleged attorney's charging lien that may result if the subject settlement proceeds are disbursed to Burstein as a result of the immediate vacation of the temporary restraining orders. To this end, this Court concedes that justice may best be served if the parties are afforded a brief opportunity to obtain relief in another forum and to have the merits of this dispute properly addressed elsewhere upon entry of the instant Order.