

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF ALABAMA**

In re

Case No. 00-6028-WRS

Chapter 13

EDWARD S. CHILDS,

Debtor

CURTIS C. REDING, TRUSTEE,

Plaintiff

Adv. Pro. No. 03-1071-WRS

v.

MORRIS BART, et al.,

Defendants

MEMORANDUM DECISION

August 5, 2004

I. INTRODUCTION

This Adversary Proceeding came before the Court for hearing on July 26, 2004, on the Motion for Summary Judgment filed by Third-Party Defendant Ben C. Martin. (Doc. 67). Ben C. Martin was present by counsel Joseph P. Schilleci, Jr., Defendants Michael T. Gallagher and the law firm of Gallagher, Lewis, Downey & Kim, were present by counsel Ryan K. Cochran, Plaintiff Curtis C. Reding was present in person and by counsel Steve Olen, and Defendant Morris Bart and the law firm Morris Bart, A.P.L.C., were present by counsel Robert P. MacKenzie.

The pertinent history of this case is as follows. On June 26, 2003, Plaintiff Curtis C. Reding the standing Chapter 13 Trustee, filed a complaint alleging that the Bart Defendants had

misappropriated property of the bankruptcy estate in the Edward S. Childs bankruptcy case. Bart is a lawyer who specializes in mass tort cases and Childs was one of several thousand class-member plaintiffs represented by Bart in a Fen/Phen class-action suit. It is alleged that the suit was settled and that the settlement funds were paid over to Childs, rather than Reding who was Childs' Trustee in bankruptcy. The gravamen of the complaint is that the settlement funds were property of the bankrupt estate and should have been paid over to Reding rather than Childs.

On July 29, 2003, Reding amended his complaint, adding Michael Gallagher and his law firm Gallagher, Lewis, Downey & Kim as Defendants. These Defendants will be referred to collectively as the Gallagher Defendants. On August 12, 2003, Bart filed a cross-claim against Gallagher. (Doc. 22). On September 9, 2003, Gallagher filed a third-party complaint, joining Ben Martin and his law firm as third-party Defendants. (Doc. 32). Also, on September 9, 2003, Gallagher filed a cross-claim against Bart. (Doc. 38). On September 25, 2003, Bart moved to dismiss Gallagher's cross-claim. (Doc. 41). That motion was denied by this Court's Order of October 29, 2003. (Doc. 55).

On March 5, 2004, Martin filed a motion for summary judgment, asking the Court to dismiss the third-party complaint filed against him by Gallagher. (Doc. 67). On March 8, 2004, the Court entered an order setting deadlines for responses to this motion. (Doc. 72). Several memoranda and evidentiary submissions have been filed by Martin and Gallagher. (Docs. 67, 68, 82–Martin; Docs. 79, 80, 81–Gallagher). This motion was argued on July 27, 2004. For the reasons set forth below, the motion for summary judgment is DENIED.

II. FACTS

While the factual setting in this Adversary Proceeding is quite involved, the salient facts which are pertinent to this motion are considerably more straightforward. As Gallagher is the nonmoving party, the Court will accept the facts from Gallagher's affidavit as true for purposes of this motion. Gallagher states in his affidavit that Martin promised to disburse the Fen/Phen settlement funds in accordance with the pertinent requirements of the Bankruptcy Code and the Bankruptcy Rules. (Doc. 81, para. 15-16).¹

Ben Martin has filed an affidavit in support of his motion which contradicts the Gallagher affidavit as to at least one material fact. (Doc. 68, pp. 25-30). While Martin admits his involvement in the Fen/Phen litigation, and further admits that he undertook to contact the Bankruptcy Trustees of several of the Fen/Phen class members, including Childs, Martin denies that he undertook to comply with the bankruptcy laws. Contrary to the representation of

¹ These two paragraphs state as follows:

“15. I relied upon Martin's promise and performance thereof. Martin told me that he had performed the agreement, and that the disbursement of the settlement funds to the clients and their lawyers had been approved. I relied upon these statements of existing fact and I took no action to comply with the Bankruptcy Rules and provisions of the Bankruptcy Code that apply to settlements such as the AHP settlement.

16. As a consequence of Martin's breach of contract and innocent misrepresentation, I have been sued in the captioned action for not seeking bankruptcy court approval of the above-described settlement. I have incurred costs in the form of fees and expenses and I have potential liability for the actions of Martin.”

(Doc. 81).

Gallagher, Martin states that “I would not file any motions or applications on behalf of anyone with any bankruptcy court.” Id. at 29. This material fact is in dispute.²

III. CONCLUSIONS OF LAW

This Adversary Proceeding is before the Court upon Martin’s motion for summary judgment. A motion for summary judgment is granted only if there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. Rule 7056, Fed. R. Bankr. P. The facts surrounding the question as to who was to make sure the relevant provisions of the Bankruptcy Code and the Bankruptcy Rules were complied with are both material and in dispute, precluding an award of summary judgment. For this reason, Martin’s motion is DENIED.

Apparently recognizing that Gallagher’s affidavit gave rise to disputed factual issues, Martin raises two legal arguments in his reply brief, which may be disposed of in short order. (Doc. 82). The first argument is that the putative oral contract is void as a matter of law. The second argument is that Gallagher had a nondelegable duty under this Court’s decision in Tri-State Plant Food, Inc., 273 B.R. 250 (Bankr. M.D. Ala. 2002).

Martin claims that the oral contract alleged by Gallagher is void and therefore, unenforceable. This Court does not quarrel with the general proposition, set out in Martin’s reply brief, that contracts to do an illegal act are void. However, the contract alleged by Gallagher does not appear to be illegal

² This is not to imply that there are not other material facts in dispute, rather the existence of one material fact in dispute is sufficient to defeat a motion for summary judgment. It is not necessary for the Court to catalog all of the facts, disputed or otherwise at this time.

in any way. Two or more law firms might work together on a case and divide the duties. If one lawyer does not hold up his end of the bargain, he might be held liable to his co-counsel for damages. Such a contract would not in any way be unlawful.

Martin further claims that a contract to ensure compliance with the Bankruptcy Code and Bankruptcy Rules is void, citing this Court's decision in Tri-State. Martin apparently misunderstands this Court's ruling in Tri-State. The Bankruptcy Code and the Bankruptcy Rules require professionals to make application for professional fees before a Debtor in a case under Chapter 11 may pay professional fees. In Tri-State, several professionals collected fees without first making application for or disclosure of the payments. Several of the professionals defended their actions upon the grounds that lead counsel for the Debtor-in-Possession, who was a bankruptcy specialist, advised that the practice was acceptable, in reliance upon his understanding of local practice. The Court rejected that defense, finding that each professional had a nondelegable duty to comply with the pertinent rules. Martin's claim that the contract alleged by Gallagher is void simply does not follow from this Court's holding in Tri-State.

IV. CONCLUSION

The gist of Gallagher's third-party action against Martin is that Martin undertook to comply with the requirements of the bankruptcy laws but failed to do so. As the evidence surrounding these facts is in dispute, summary judgment cannot be granted. Moreover, Martin's

legal arguments, raised in his reply brief, are without merit. For these reasons, the motion for summary judgment is DENIED.

Done this 5th day of August, 2004.

/s/ William R. Sawyer
United States Bankruptcy Judge

c: Steve Olen, Esq.
Joseph P. Schilleci Jr., Esq.
Ryan K. Cochran, Esq.
Robert P. MacKenzie III, Esq.