

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In re)
)
THE GREATER SOUTHEAST) Case No. 99-01159
COMMUNITY HOSPITAL FOUNDATION,) (Chapter 11)
INC., et al. (members of the)
Greater Southeast Healthcare) Jointly Administered
System),)
)
Debtors.)
)

DECISION RE MOTION TO COMPEL PRODUCTION OF DOCUMENTS

This supplements the court's oral decision of June 7, 2001, addressing the Emergency Motion to Compel (Docket Entry No. 2150) filed by Greater Southeast Community Hospital Corporation ("the Hospital"), a debtor in these jointly administered cases. The motion seeks to compel the law firm of Jordan, Keys & Jessamy, LLP ("Jordan Keys") to produce files and documents related to the medical malpractice law suit of Thompson v. Greater Southeast Community Hospital, et al., No. 97-CV-8235 in the Superior Court of the District of Columbia.

I

Jordan Keys represented the Hospital prepetition in the Thompson lawsuit. Pursuant to prior order of this court, relief from the automatic stay was granted to Thompson to pursue the Superior Court litigation on the condition that Thompson would not pursue recovery from the Hospital's estate, but would look for recovery only from insurance coverage by American Continental Insurance Company

("ACIC") for recovery and any money held by the Hospital in trust for medical malpractice claimants. The Hospital holds a self-insurance fund at Riggs National Bank that will likely be the subject of future litigation in this court regarding whether the fund is held in trust for medical malpractice claimants. Even if the account is held in trust, the debtor would likely be entitled to recover from the trust any amounts unnecessary to pay medical malpractice claims. In that event, it would benefit the debtor's estate to minimize malpractice recoveries against the Hospital to the point that the ACIC insurance (which has dollar limits) fully pays all such claims.¹

When the stay was lifted, the Hospital tendered defense of the Thompson case to ACIC, and ACIC agreed to provide a defense. ACIC elected to retain counsel other than Jordan Keys to defend the Hospital. The Thompson case is set for pretrial conference at the Superior Court on June 26, 2001, and under Superior Court Rule of Civil Procedure 16, the parties are required to file a joint pretrial statement by June 19, 2001.

Jordan Keys has refused to turn over to the Hospital certain papers that Jordan Keys compiled in representing the Hospital. The

¹ Some claims may be ineligible for payment from ACIC insurance on different grounds (for example, tardiness of reporting the malpractice claim to ACIC). But the Hospital hopes that the ACIC coverage will suffice fully to pay those claims that are eligible for ACIC coverage but for the dollar limits of coverage, and that the claims not eligible for ACIC coverage will not exhaust the Riggs fund.

Hospital seeks under 11 U.S.C. § 542(e) to compel turnover of the documents withheld by Jordan Keys so that its new attorneys may use the documents in preparing the pretrial statement for filing in the Superior Court.²

II

Jordan Keys defends by asserting that it holds a retaining lien against the documents. Although District of Columbia common law accords an attorney a retaining lien against a client's files, Wolf v. Sherman, 682 A.2d 194, 197 n.8 (D.C. 1996), Jordan Keys concedes that, under D.C. Bar Rule of Professional Conduct 1.8, its right to assert a retaining lien is limited to documents constituting attorney work product.

Although the court was able to determine on an expedited basis that some of the documents are not attorney work product, some of the

² Ordinarily turnover under 11 U.S.C. § 542(e) should be sought by way of an adversary proceeding, but Jordan Keys has not objected to turnover being sought by way of motion. F.R. Bankr. P. 7001. But Jordan Keys did not oppose the motion on that basis, and it would serve no useful purpose for the court to force the parties to pursue the issue in an adversary proceeding.

Similarly, the Hospital served a subpoena on Jordan Keys to produce the documents and its motion seeks to enforce the subpoena. But the pendency of the bankruptcy case alone was not a warrant to issue the subpoena to Jordan Keys: a subpoena can be issued only in a particular proceeding within the case or pursuant to an examination authorized under F.R. Bankr. P. 2004. Nevertheless, a turnover proceeding can be brought based on § 542(e) without the necessity of a subpoena.

remaining documents undoubtedly do constitute work product.³ Because turnover is warranted even if a document is attorney work product, this decision merely assumes that certain specific documents are attorney work product, without prejudice to further litigation over that point.

III

The principal issue is whether the court ought to order Jordan Keys to produce attorney work product documents pursuant to § 542(e). The courts recognize that the court may compel turnover under § 542(e), but also attempt to protect the lien rights of the attorney under local law. Varying degrees of protection have been formulated by the courts. Rather than discuss all of the decisions, it suffices to say that the court will basically follow the approach of In re Olmsted Utility, Inc., 127 B.R. 808 (Bankr. N.D. Ohio 1991). First,

³ For purposes of this expedited decision, the parties prepared a log of the documents at issue. The log was not meant to be a definitive log setting forth all of the factual predicates for Jordan Keys' establishing that each document is attorney work product. However, the court was able to ascertain that some of the documents were not attorney work product: copies of depositions and correspondence with third parties plainly do not constitute attorney work product regardless of what further factual predicate Jordan Keys might try to lay. The court has assumed that the remaining documents are indeed attorney work product (even though the log does not lay out all of the necessary factual predicates for finding that the documents are attorney work product). The court has assumed, for example, that handwritten notes are attorney work product even though the log does not negate the possibility that a Hospital employee wrote the note such that the document would not be attorney work product.

"where the papers turned over neither add to the estate nor help preserve it, there appears to be no basis on which to compensate the lien holder." Olmsted Utility, 127 B.R. at 813. Second, the court may order turnover with the question of the amount to be paid the attorney pursuant to the retaining lien to be determined once the benefit to the estate can be measured. Olmsted Utility, 127 B.R. 813-14.

IV

The debtor must file a pretrial statement by June 19, 2001. This exigency warrants requiring turnover of the files, with compensation for Jordan Keys' retaining lien to be decided later. The turnover (1) may reduce the attorney's fees that would otherwise be incurred in litigation of the Thompson case or (2) enable the Hospital to minimize any award in the Thompson case. To the extent that this benefits the estate, Jordan Keys ought to have compensation for the value it imparted to the estate.

How that value will be determined need not be decided now. Plainly Jordan Keys will be allowed to show the attorney's fees that would have been charged for the work product on an hourly fee basis. Moreover, the court will not now foreclose Jordan Keys from alternatively showing what the market generally would command--the price that an attorney and his client generally would negotiate as the price for turnover of the materials. Such a negotiated price of

surrender is ordinarily how the value of a retaining lien is fixed.⁴

V

Why would there be any value to the estate if Thompson is limited to recovery from non-estate assets and if ACIC is providing a defense? With respect to the avoidance of the expense of litigation, the debtor has an incentive to minimize those expenses. Although ACIC has agreed to provide a defense to the Hospital, ACIC has stated to the Hospital that it is doing so gratuitously. Given the time frames involved, the court cannot decide before June 19, 2001, whether ACIC is contractually obligated to provide a defense. But it does not matter.

On the one hand, if the ACIC is not contractually obligated to provide representation, the Hospital would face the risk that it

⁴ If the materials supplied a vital insight into the handling of the litigation, one that replacement counsel would likely have missed given the time constraints, then Jordan Keys might argue that the value of that insight warrants treating Jordan Keys as entitled to compensation beyond the hourly fees for the particular work product (capped, of course, by Jordan Keys' outstanding fee claim for the totality of its representation of the Hospital). That argument, however, would appear to be inconsistent with D.C. Rules of Professional Conduct, Rule 1.8(i) which permits assertion of a retaining lien "only to the extent that the work product has not been paid for." If the Hospital pays for the work product on an hourly fee basis, Rule 1.8(i) would appear to bar compensation above and beyond compensation for the work product. But see Olmsted Utility, 127 B.R at 813-14 ("under Ohio Law . . . the award is not to be measured only by the papers copied but, more importantly perhaps, by the Debtor's access to the papers in the Anderson Case at the time and under the circumstances in which such access was ordered").

might have to foot the expense of representation if ACIC were to revoke its gratuitous provision of a defense. Moreover, although Thompson is looking only to non-estate assets for recovery, the Hospital has a residual interest in any trust funds it holds for the benefit of malpractice claimants. The estate will potentially be benefitted because the successful defense of the Thompson case may increase trust funds that the estate may use for general unsecured claimants after payment of all medical malpractice claims. Accordingly, Jordan Keys will be entitled to a replacement lien against the debtor's residual interest in any funds held in trust for medical malpractice claimants such as Thompson.

On the other hand, the expense is the Hospital's even if ACIC is contractually required to furnish a defense: ACIC's provision of a defense is simply a coverage of the Hospital's cost of litigation, within any dollar limits that may exist under the insurance policy. If the Hospital incurs the expense instead of ACIC, then ACIC would be obligated to reimburse the estate for that expense.

Assuming that ACIC is contractually obligated to cover the Hospital's costs of litigation, the value of the turnover of Jordan Keys' attorney work product ought to be an expense chargeable to the Hospital. The Hospital will then be entitled to be reimbursed for that expense by ACIC. That right to reimbursement is a property right, part of the Hospital's bankruptcy estate. The court will thus

grant Jordan Keys a replacement lien on the debtor's right to any reimbursement of expense from ACIC.

The court will thus grant Jordan Keys a replacement lien on the Hospital's right to reimbursement of expenses by ACIC, if any such right exists with respect to the Thompson case.

VI

The Hospital also contends that under Rule 1.8(i) Jordan Keys is not entitled to assert a retaining lien:

when the client has become unable to pay, or when withholding the lawyer's work product would present a significant risk to the client of irreparable harm.

As to the first exception, the Hospital has the ability to pay for the benefit by way of granting replacement liens on any enhancement of its residual interest in any trust arising from use of the work product and on any right of reimbursement from its insurer of its expenses of litigation.⁵

As to the second exception, the record does not support a finding that the Hospital faces a risk of irreparable harm.

⁵ Jordan Keys may not rely upon the Hospital's ownership of other funds it could use to pay Jordan Keys: use of those funds to pay Jordan Keys would not confer any benefit on the estate independent of enhancement of (1) the Hospital's residual interest in any trust and (2) reduction of the amount of expenses for which the Hospital would otherwise be entitled to seek reimbursement from ACIC. The court interprets § 542(e) as trumping the retaining lien if the materials confer no benefit on the estate, and thus as justifying limiting Jordan Keys' replacement lien to (1) the enhancement of the Hospital's residual interest in any trust, and (2) the Hospital's right, if any, of reimbursement from ACIC.

According to Comment 10 to Rule 1.8(i), irreparable harm exists when a client "might irretrievably . . . become subject to a significant liability because of the withholding of the workproduct." However, "[a] lawyer must make his or her own judgment as to whether the client will be irreparably harmed if the work product is withheld." D.C. Bar Op. No. 250. The work product in the possession of Jordan Keys includes research material, handwritten notes, and internal memoranda (e.g., regarding locating expert witnesses). The record does not establish that production of the work product is necessary to avoid irreparable harm.

First, any work product relating to the facts of the Thompson case is likely not to contain any information not otherwise available to replacement counsel, so that there is no risk of irreparable harm. Most of any factual information contained in the Jordan Keys files is probably already of record in pleadings, responses to written discovery, and transcripts of depositions taken,⁶ and replacement counsel can (and almost surely has already) interviewed the potential witnesses in the case and examined the Hospital's records.

Second, legal research is rarely of a character that its nondisclosure would cause irreparable harm. The court assumes that

⁶ Jordan Keys did not obtain a consensual lien on the deposition transcripts it purchased for the Hospital, or any of the other property of the Hospital. It only looks to a retaining lien to protect its fees.

the Hospital's replacement counsel would be competent to research any legal issues in the remaining time before the pretrial conference; the replacement counsel's bill for conducting such legal research would not be irreparable harm because ACIC is furnishing such counsel to the Hospital. Accordingly, the court is dubious that there is anything in Jordan Keys' work product materials whose withholding would cause the Hospital irreparable harm.

An order follows.

Dated: June 11, 2001

S. Martin Teel, Jr.
United States Bankruptcy Judge

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