

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)
)
CHARLES KOHLER and) CASE NO. 03-35953 HCD
ALICIA KOHLER,) CHAPTER 7
)
DEBTORS.)

Appearances:

Jacqueline Sells Homann, Esq., counsel to Trustee, Jones Obenchain, LLP, 600 Key Bank Building, 202 South Michigan Street, Post Office Box 4577, South Bend, Indiana 46634-4577; and

Jeffrey J. Stesiak, Esq., Special Counsel to Trustee, Pfeifer, Morgan & Stesiak, 53600 North Ironwood Drive, South Bend, Indiana 46635.

MEMORANDUM OF DECISION

At South Bend, Indiana, on June 27, 2014.

Before the court is the Motion to Compromise and Settle, filed by the chapter 7 Trustee Jacqueline Sells Homann, by counsel, and the Objection to Motion to Compromise and Settle, filed by Jeffrey J. Stesiak, Special Counsel. A hearing on the matter was held on April 22, 2014, and the matter was taken under advisement. For the reasons that follow, the court denies the Motion without prejudice.¹

BACKGROUND

The uncontested facts reflect that the debtors Charles and Alicia Kohler filed their chapter 7 bankruptcy petition on October 16, 2003. On Schedule B, the debtors listed a personal injury claim of unknown value held by Alicia Kohler. At the 341 meeting of creditors, the Trustee learned that a personal injury case was pending in Porter County Superior Court and that Jeffrey J. Stesiak was Alicia Kohler's lawyer. In her Motion to Compromise and Settle the Trustee further reported that the personal injury case

¹ The court has jurisdiction to decide the matter before it pursuant to 28 U.S.C. § 1334 and § 157 and the Northern District of Indiana Local Rule 200.1. The court has determined that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).

arose out of a July 28, 2002 motor vehicle accident in Michigan City, Indiana, involving the debtor and four other plaintiffs. All were family members, and two were minors. Years ago, she stated, the defendant's insurance company tendered the full policy amount, \$100,000, to the state court. In addition, years ago the plaintiffs, after meeting with Attorney Stesiak, agreed that the \$100,000 should be allocated to each of the plaintiffs based, it appears, upon the extent of injury to each. Only in 2013, however, the Trustee asserted, did she learn that Alicia Kohler was apportioned \$18,000 of the insurance proceeds.

With the approval of this court, on February 18, 2004, the Trustee hired Jeffrey J. Stesiak to serve as Special Counsel to the bankruptcy estate in that personal injury claim. *See* R. 24, Order Authorizing Employment of Special Counsel. The debtors were granted a discharge on May 9, 2005, but the case remained open to administer the personal injury case.

Years passed. Upon the court's request for a status report, the Trustee reported that, although part of the case had been settled, a significant portion remained open, and a trial was possible. *See* R. 32, Trustee's Status Report, April 28, 2010. Three years later, after a further Order from the court, the Trustee filed another Status Report. This one stated the difficulties involved, both in the state court settlement and in her communication with Special Counsel Stesiak.

. . . The case was settled in principle years ago. However, there are a number of plaintiffs, and Attorney Stesiak was trying to work out the distribution to each of the plaintiffs. Although Trustee attempted to reach him nearly every thirty days, she finally filed a motion with the state court to hold a hearing on the status and resolution of the matter. A hearing was held on April 5, 2013. At that hearing, Attorney Stesiak reported that he had located all the plaintiffs and believed he could have the matter resolved within 60 days.

Although Trustee has contacted Attorney Stesiak twice since that date, he has not contacted her to resolve the issues in this case, and it remains outstanding.

R. 36, Trustee's Status Report, July 10, 2013.

On September 18, 2013, the Trustee filed a Motion to Compromise. *See* R. 37. It stated that the parties had agreed that the bankruptcy estate would receive \$3,000 from the insurance company on behalf of the debtor as full and final settlement of the claims. It was also agreed that Special Counsel Stesiak would

not take any fees or expenses out of that settlement. The Trustee asserted that it was appropriate and in the best interest of the estate to accept that amount, and asked the court to accept the recommended settlement. *See id.* at 2.

On October 10, 2013, however, the Trustee served Notice of the Withdrawal of that Motion. *See* R. 39. On February 17, 2014, she filed a subsequent Motion to Compromise and Settle, the one now before the court. *See* R. 40. In explanation, the Trustee stated that she learned from the debtor (rather than from Special Counsel) of Alicia Kohler's allocation of \$18,000 in insurance proceeds; moreover, she learned it only after the Trustee had filed the first (now withdrawn) Motion to Compromise on September 18, 2013. The Trustee included the following allegations in the Motion:

5. . . . Special counsel to the bankruptcy estate never revealed that information [concerning Alicia Kohler's portion of the insurance proceeds] to his client, the bankruptcy estate.
6. In addition, because the personal injury case was not moving forward, and although she tried regularly to obtain information from her special counsel, she was not kept apprised of the status of the case and telephone calls and letters typically went unanswered.
7. As a result of this, the Trustee's counsel entered her appearance in state court, appeared in multiple court hearings in Porter County to protect the bankruptcy estate's interest in the litigation, but has also had to negotiate with special counsel for all the money that is due and owing to the bankruptcy estate. The estate has incurred significant attorney fees as a result of the necessity of regular counsel for the bankruptcy estate's involvement and appearance at court hearings.

Id., p. 2. The Trustee then made three requests in her Motion. She first asked the court to approve the insurance proceeds allocated to Alicia Kohler, in the amount of \$18,000, as appropriate in light of her injuries and in light of the more serious injuries sustained by one minor who received a larger portion of the proceeds.² She also asked the court to approve the expenses incurred by Special Counsel Stesiak, in the amount of \$568. However, her third request was that the court deny Special Counsel's attorney fees. According to the Trustee, under the fee arrangement the Special Counsel was entitled to 1/3 of the \$18,000

² The Trustee also asserted that she "believe[d] that special counsel would also affirm that amount [\$18,000] as appropriate for Alicia Kohler's injuries, given the limitation of funds from the [underinsured driver] defendant." *Id.*, ¶ 8.

settlement, namely \$6,000. Nevertheless, she argued, the estate had incurred significant attorney fees in order to protect its interest in the litigation. The estate's attorney fees, the Trustee noted, "are at or near the \$6,000 fee that Attorney Stesiak would have otherwise been entitled to" receive. *Id.*, ¶ 10. She insisted that Special Counsel had "failed to do his job" and that the bankruptcy estate's creditors "should not be charged twice for attorney fees." *Id.*, ¶ 11.

Special Counsel Stesiak filed his Objection to the Trustee's Motion. *See* R. 42. He pointed out the services he had done for Alicia Kohler in the state court litigation: the filing of a complaint and amended complaint; discovery, including the retrieval of medical documents and the defendant's deposition; summary judgment briefs; further search for the defendant's assets (without success); and meetings with the parties to determine how to divide the only assets, the insurance proceeds. The litigation continued, Special Counsel Stesiak explained, because the father of the seriously injured minor child, then divorced from the child's mother, could not be located to approve the proposed settlement for the minor.

Special Counsel Stesiak then described Trustee Homann's contacts with him:

5. Trustee Homann sent Special Counsel a letter dated January 7, 2013, stating "My bankruptcy case has been pending for nine years and I'm only looking for \$3,000.00 from the personal injury settlement."

6. On February 20, 2013, Trustee Homann appeared in the State Court action and requested a status conference.³

7. At some point Trustee Homann was contacted by the debtors and was told that they believe they may be entitled to \$18,000.00 out of the settlement. Trustee Homann then demanded the additional \$15,000.00 for which Special Counsel requested payment of his contractual attorney fee of 33 1/3%, along with his expenses of \$568.00, and the payment of the lawsuit loan the debtors took out to proceed with their case. Trustee Homann would not agree, wanting \$15,000.00 and even stated in an email dated December 19, 2013 that "If I don't get it, I will have to file a motion with the court asking you to turn the money over and seeking sanctions." Special Counsel told Trustee Homann that he took offense to that threat.

Id., pp. 2-3.

³ Trustee Homann stated that several hearings were set at the request of Trustee's counsel. Special Counsel Stesiak responded that the state court docket showed that only one hearing was requested by her.

Special Counsel Stesiak explained that Trustee Homann was paid the \$3,000.00 she requested from the settlement on September 13, 2013, without a reduction of attorney fees or expenses. He further noted that no settlement could be reached in this bankruptcy court until the Porter County Superior Court approved the allocation of the share to be distributed to the seriously injured minor, and that the court's approval had not yet been given. He insisted that his pre-bankruptcy work on behalf of Alicia Kohler warranted an award of attorney fees and that Trustee Homann's decision to enter her appearance in the underlying state court action was unnecessary. After underscoring that the bankruptcy estate would be paid once the Porter County Superior Court approves a settlement or holds a hearing to divide the proceeds, he asked the court to grant his contractual attorney fee and expenses.

After a hearing on the Motion and Objection, the court took the matters under advisement.

DISCUSSION

By motion the Trustee, attempting to move this eleven-year-old case to closure, asks the court (1) to approve a settlement of \$18,000, of which the bankruptcy estate has received \$3,000; (2) to authorize payment of Special Counsel Stesiak's expenses, in the amount of \$568; and (3) to deny payment of Special Counsel's attorney fees. The court finds that the Trustee's Motion, by asking both for approval of a settlement and review of the Special Counsel's compensation, includes more than one request for relief, in violation of the requirements of local bankruptcy rule B-9013-1(a). *See* N.D.Ind. L.B.R. B-9013-1(a) (“[E]very application, motion, or other request for an order from the court . . . shall be filed separately.”). Normally, when reviewing such a motion, the court takes no further action on the pleading as filed; it requires the movant to refile separate requests for relief. In this case, however, the court, sharing the Trustee's frustration in her inability to close this ancient case, construes the motion by the name in the caption and treats it solely as a Motion to Compromise and Settle. *See id.* (“All such requests shall be named

in the caption [and] shall state with particularity the order or relief sought and the grounds for the motion.”)⁴

Federal Rule of Bankruptcy Procedure 9019(a) provides that, “[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement.” Fed. R. Bankr. P. 9019(a).

The court has the broad authority and discretionary power to decide whether to approve a compromise or settlement. *See In re Doctors Hospital of Hyde Park, Inc.*, 474 F.3d 421, 426 (7th Cir. 2007). It must determine whether the settlement is in the best interest of the bankruptcy estate.

The linchpin of the “best interests of the estate” test is a comparison of the value of the settlement with the probable costs and benefits of litigating. *In re Energy Coop.*, 886 F.2d [921,] at 927 [(7th Cir. 1989)]. Among the factors the court considers are the litigation’s probability of success, complexity, expense, inconvenience, and delay, “including the possibility that disapproving the settlement will cause wasting of assets.” *In re Am. Reserve Corp.*, 841 F.2d [159,] at 161 [(7th Cir. 1987)].

Id.

In this case, however, the court first must determine whether there was an actual settlement. No documentary proof of an agreed compromise or settlement has been proffered to or filed in this court.

Trustee Homann, when requesting authorization to employ special counsel more than a decade ago, had

⁴ The court notes that no application or statement of the compensation agreed to be paid to Special Counsel has been filed with this court, pursuant to 11 U.S.C. § 328, upon the completion of the services he rendered to the Trustee. Special Counsel Stesiak was employed under § 327(e) with this court’s approval for the specified purpose of prosecuting a contingent personal injury claim, on the grounds that his retention was in the best interest of the bankruptcy estate and that a settlement could be reached without the commencement of litigation. *See* R. 22, 24. A special counsel’s compensation on a contingent fee basis is subject to court approval under § 328. *See* § 328(a) (authorizing court to review and to modify a compensation award “after the conclusion of such employment, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated . . .”); *see also In re ASARCO, L.L.C.*, 702 F.3d 250, 257-64 (5th Cir. 2012) (reversing bankruptcy court for failure to satisfy § 328(a)’s improvidence exception); *Paloian v. Grupo Seria S.A. de C.V.*, 433 B.R. 19, 45-46 (N.D. Ill. 2010) (requiring evidence that fee agreement was improvident); *cf. In re Wald*, 2013 WL 1680102 at *3 (W.D. Tex., Apr. 17, 2013) (“The Bankruptcy Code expressly contemplates that the compensation actually awarded may differ from the terms and conditions authorized by the Bankruptcy Court” under the improvidence test of § 328(a)). This court is authorized to consider whether the terms of Special Counsel’s engagement were improvident under § 328, and it will make that determination when Special Counsel completes the services to which he agreed and files an application for compensation with this court. At that time, the court also will consider any objection filed in response to Special Counsel’s application.

informed the court that Attorney Stesiak already had prepared a settlement brochure and had filed a demand for payment with the defendant's insurer. *See* R. 22, ¶ 4. It appears that the insurance proceeds were paid to the state court, in the amount of \$100,000, years ago, and that the proceeds were divided among the defendants, with Alicia Kohler being allocated \$18,000. However, a decade later, it still is not known whether the settlement was finalized and whether the debtor actually received her allotted amount.

Special Counsel Stesiak informed the court that, because the Porter County Superior Court has not approved the minor's share of the proceeds, no settlement has been reached that this court can approve. Whether Alicia Kohler's \$18,000 allocation was dependent on the state court's approval of the minor's share; whether the state court has yet to approve all the allocated amounts; whether the debtor Alicia Kohler already received all or a portion of her allotted damages award – these are a few of the questions of fact that have not been explained.

Without a confirmed settlement and/or liquidated damages award to Alicia Kohler from the personal injury lawsuit, this decade-old bankruptcy case cannot be concluded.⁵ It certainly has not been conducted expeditiously. Chapter 7 trustees are required, under the Bankruptcy Code, to collect and liquidate the property of the estate and to close the estate “expeditiously.” 11 U.S.C. § 704(a)(1). *See Matter of Wade*, 991 F.2d 402, 406 (7th Cir. 1993) (“A trustee is charged with the duty of closing the estate as expeditiously as may be compatible with the best interests of the parties.”). Special counsel who are retained for a specific purpose can assist in resolving matters more efficiently for the benefit of the bankruptcy estate. *See* § 327(e); *see also In re Goldstein*, 383 B.R. 496, 501 (Bankr. C.D. Cal. 2007) (commenting that continuing services of counsel familiar with non-bankruptcy litigation are in the best interest of estate and expedite bankruptcy process). However, professionals who accept appointments as special counsel to

⁵ The court notes that the Trustee's original Motion to Approve Compromise asked the court to accept the estate's agreed settlement amount of \$3,000 “as full and final settlement of any and all claims arising from the alleged incident.” R. 37, ¶ 5. Her abandonment of the estate's interest in the lawsuit was withdrawn, however, when she learned of the \$18,000 damages allocation which may have been awarded.

chapter 7 trustees also must “assume[] a duty of loyal representation to the bankruptcy estate.” *In re Rama Group of Companies, Inc.*, 496 B.R. 307, 315 (Bankr. W.D.N.Y. 2013).

In this case, this court authorized the Trustee to employ Attorney Stesiak as special counsel to litigate the contingent claim held by Alicia Kohler against the underinsured motorist Andrzej Kalita. *See* R. 24. The Trustee justified her request to retain Attorney Stesiak on the ground that, before January 2004, he had prepared a settlement brochure, had filed a demand for payment with the defendant’s insurer, and appeared to be close to settlement without the need for litigation. *See* R. 22. The court had authorized his employment “assuming that a settlement can be reached without the commencement of litigation.” R. 24. With that background information the Trustee and the court had justifiable confidence that Attorney Stesiak’s retention would aid in the expeditious administration of the bankruptcy estate. However, more than six years later, in her Status Report of April 28, 2010, the Trustee notified the court that “a May 7, 2010 conference [in the Porter County Superior Court] is scheduled to set a trial date.” R. 32. More than three years afterwards, in her Status Report of July 10, 2013, she reported Attorney Stesiak’s statement to the state court judge at a hearing held on April 5, 2013: “[H]e had located all the plaintiffs and believed that he could have the matter resolved within 60 days.” R. 36. More than fourteen months have passed since that April 5, 2013 hearing, and no resolution has been reported to this court.

Although the court may be more fully informed by the parties in the future, it is presently of the opinion, from the filed documents and testimony at the hearing, that the decade-long personal injury case and bankruptcy case have not been of benefit to anyone. Alicia Kohler and her fellow plaintiffs in the Porter County Superior Court, some seriously injured, almost certainly have been prejudiced by the delay in finality of the state court case, and Alicia Kohler has been doubly prejudiced by the lack of finality in this bankruptcy case. Indeed, the debtors were further hindered when their bankruptcy attorney, Laura Larson Sullivan, was suspended from the practice of law in the United States District Court, effective September 1, 2006, for a period of ninety days. *See* R. 28. It is likely that the debtors have been unrepresented since that

date: No attorney has appeared, and indeed there was no activity whatsoever in the debtors' bankruptcy case from May 9, 2005 (when the debtors' Order of Discharge was entered) until the court itself took the action of ordering the Trustee to submit Status Reports on March 25, 2010 and June 27, 2013. The Trustee's Motion to Compromise and Settle, now before this court, cannot bring a resolution to Alicia Kohler's state court claim or conclude administration of the chapter 7 case because no settlement of the personal injury case has been presented to this court.

Without a confirmed settlement before it, this court has nothing to approve or disapprove. It therefore denies the Trustee's Motion, but without prejudice to its resubmission when some resolution is forthcoming. As the Special Counsel put it, the Motion is premature. The parties are directed to notify this Bankruptcy Court when the Porter County Superior Court has resolved the personal injury issues before it. At that time, this court can determine the merits remaining in the chapter 7 case before it.

Accordingly, for the reasons set forth in this Memorandum of Decision, the court denies without prejudice the Motion to Compromise and Settle filed by the chapter 7 Trustee Jacqueline Sells Homann.

SO ORDERED.

Harry C. Dees, Jr., Judge
United States Bankruptcy Court