UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

NOT FOR PUBLICATION

In re:	:	Chapter 11
	:	
MICHAEL G. TYSON, et al.	:	Case No. 03-41900(ALG)
	:	
	:	
Debtor.	:	
	:	

MEMORANDUM OF OPINION

A P P E A R A N C E S:

PACHULSKI, STANG, ZIEHL, YOUNG, JONES & WEINTRAUB P.C.
Attorneys for the Debtors and Debtors in Possession and the Plan Administrator
By: Robert J. Feinstein, Esq.
Malhar S. Pagay, Esq.
Maria A. Bove, Esq.
780 Third Ave., 36th Floor
New York, New York 10017

PROSKAUER ROSE LLP
Counsel to Jimmerson Hansen, P.C.
By: Scott K. Rutsky, Esq.
Adam T. Berkowitz, Esq.
1585 Broadway
New York, New York 10036

-and-

JIMMERSON HANSEN, P.C.
By: James J. Jimmerson, Esq.
Mario P. Lovato, Esq.
415 South Sixth Street, #100
Las Vegas, Nevada 89101

ALLAN L. GROPPER
UNITED STATES BANKRUPTCY JUDGE

Before the Court is an Objection to Claims, filed by the administrator of the plan trust ("Plan Administrator") established in connection with the confirmed plan of debtor Michael G. Tyson (the "Debtor"). The Plan Administrator seeks to reclassify as unsecured the claims of the law firm of Jimmerson Hansen, P.C. ("Jimmerson") for attorneys' fees. Jimmerson filed four proofs of claim, claims 51, 52, 53, 54, arising out of pre-petition legal services. It contends that all of these claims are secured by statutory attorney's liens attaching to property of the Debtor located at 6740 Tomiyasu Lane (the "6740 Parcel") and 6760 Tomiyasu Lane, Las Vegas Nevada (the "6760 Parcel" and, collectively with the 6740 Parcel the "Parcels"). The Plan Administrator asserts that (i) Nevada law does not provide a charging lien to a law firm under present circumstances; (ii) if such a lien were available, Jimmerson did not timely perfect it; (iii) the lien does not attach to both Parcels and (iv) the lien does not secure all of the Jimmerson claims. As set forth below, the Plan Administrator's objection is overruled in part and granted in part.

Background

In 1997, the Debtor married Dr. Monica Turner ("Turner"). Prior to the marriage, the Debtor had purchased the 6740 Parcel. In 2001, the Debtor purchased the 6760 Parcel and, pursuant to Nevada law, it became community property and Turner gained an interest in half its value. See NRA 123.220. Turner did not, under Nevada law, obtain an interest in the 6740 Parcel. In 2002, Turner filed for divorce in Maryland, asserting *inter alia* claims against both Parcels, notwithstanding that the purchased the 6740 Parcel was

not community property. The Debtor retained Jimmerson to represent him and Jimmerson filed on the Debtor's behalf a counter-suit for divorce in Nevada seeking, among other things, clear title to both Parcels.

In November of 2002, the parties settled their dispute and agreed to a consensual divorce. Pursuant to the Settlement Agreement entered into by the Debtor and Turner and incorporated, but not merged, into the judgment of divorce in Maryland (the "Settlement Agreement"), the Debtor received clear title to both Parcels; however, the Debtor was obligated to pay Turner $6.5 million in addition to alimony, child support and attorneys' fees.[1] The divorce was made final in Maryland on January 13, 2003. Turner then attempted to have the divorce recognized in Nevada by filing a notice of foreign divorce. The Debtor, however, objected to the Nevada court's recognition of the foreign divorce, arguing that until all the papers required by the Settlement Agreement were final, recognition would be premature. The parties worked to finalize the terms of the settlement, the result of which was an amended settlement agreement, executed on March 26, 2003. The Debtor then withdrew his objection to the recognition of the foreign divorce and on June 19, 2003, dismissed the Nevada divorce action.

On April 23, 2003, after the Settlement Agreement had been executed but before the conclusion of the divorce proceedings, Jimmerson filed in Nevada a notice of an attorneys' lien on both Parcels. The papers transferring Turner's interest in the 6760 Parcel to the Debtor were not filed until after the notice of lien had itself been interposed.

On August 1, 2003, the Debtor filed for Chapter 11 bankruptcy protection. Jimmerson subsequently filed four proofs of claim. Claim 51 asserts a claim of

[1] The Settlement Agreement also required the Debtor to sign over to Turner certain real property located in Connecticut. Turner was to sell the Connecticut property and credit the purchase price toward the $6.5 million settlement payment.

$155,887.81 for services allegedly rendered in the divorce proceedings with Turner. Claims 52, 53 and 54, for $1,752.75, $2,393.88 and $27,948.65, respectively, are for other legal services unrelated to the Debtor's divorce. Jimmerson asserts that each of its proofs of claim is secured by the Parcels by virtue of a charging lien.

DISCUSSION

The Plan Administrator makes four arguments that Jimmerson's alleged lien is invalid or unenforceable and that its claims are unsecured: first, that there was no "recovery" of any property by Jimmerson, because the Debtor merely received his own property in a divorce settlement; second, that Jimmerson's charging lien can only extend to the 6760 Parcel, which was community property; third, that even assuming Jimmerson could assert a charging lien on the Parcels, the firm failed to file a timely notice of the lien; and fourth, that only claim 51 is, in any event, secured. The Debtor does not argue that an attorney's statutory charging lien is not recognizable in a bankruptcy case, and there is ample authority that it is. *In re Life Imaging Corp.*, 31 B.R. 101, 102 (Bankr. D. Colo. 1983) ("An attorney's lien which is valid under state law is not extinguished when the client files bankruptcy. Further, there is no provision in the Bankruptcy Code for the voiding of a valid statutory attorney's lien").

A Charging Lien Can Attach to Proceeds of a Divorce Settlement

Under the Nevada's attorneys' lien statute,

> An attorney at law shall have a lien upon any claim, demand or cause of action, including any claim for unliquidated damages, which has been placed in his hands by a client for suit for collection, or upon which a suit or other action has been instituted. The lien is for the amount of any fee which has been agreed upon by the attorney and client. In the absence of an agreement, the lien is for a reasonable fee for the services which the attorney has

> rendered for the client on account of the suit, claim, demand or action.

N.R.S. § 18.015(1). Pursuant to Nevada lien law, this charging lien attaches to "any money or property which is recovered on account of the suit or other action, from the time of service of the notices required by this section." N.R.S. § 18.015(3). The Nevada courts have held that the Nevada lien law "should be liberally construed in aid of the object of the legislature, which was to furnish security to attorneys by giving them a lien upon the subject of the action." *Berrum v. Georgetta*, 98 P.2d 479, 480 (Nev. 1940).

In *Berrum*, the Nevada Supreme Court upheld a charging lien asserted against both the client who hired the attorney in the divorce proceeding and her ex-husband, who paid funds to the clerk of the court for her, following a recovery of cash on behalf of the client. *Berrum* at 481. The rule that an attorney may file a charging lien against proceeds received in a divorce action pursuant to "equitable distribution" (but not against a fund created for alimony or child support) is consistent with the law in other jurisdictions. 2 ROBERT L. ROSSI, ATTORNEYS' FEES §12:29; *Mitchell v. Coleman*, 868 So. 2d 639, 641 (Fla. Dist. Ct. App. 2004); *Schmidt v. Smith*, 118 S.W.3d 348 (Tenn. 2003); *Lipton v. Warner, Mayoue & Bates, P.C.*, 492 S.E.2d 281, 283 (Ga. Ct. App. 1998); *Hester v. Chalker*, 476 S.E.2d 79, 81 (Ga. Ct. App. 1996); *In re Mann*, 697 P.2d 778, 780 (Colo. Ct. App. 1984). Courts have also ruled that an attorney may file a charging based on an award of an equity interest in the marital home. See *In re Mann*, 697 P.2d at 780; *Lipton*, 492 S.E.2d at 283.

Divorce settlements are not treated any differently from divorce judgments for the purposes of enforcing a charging lien. Cf. *Lipton*, 492 S.E.2d at 283; *Hester*, 476 S.E.2d at 81. While there are no Nevada cases directly on point, the Florida case of S*hawzin v.*

Sasser, 658 So. 2d 1148 (Fla. Dist. Ct. App. 1995), is illustrative.[2] In *Shawzin*, a husband and wife entered into a divorce settlement whereby the husband agreed to pay his wife $550,000 in alimony in exchange for her interest in the marital home. The Florida court, in upholding the validity of a charging lien, held that where "the primary dispute in the dissolution proceeding centered on [the husband's] interest in the marital home . . . deciding that issue and finding that that is [the husband's] property constituted the type of positive results that ultimately resulted in this case." *Shawzin*, 658 So. 2d at 1150. Based on the Nevada Supreme Court's liberal interpretation of the lien law in order to provide security to attorneys, and on the relevant case law in other jurisdictions, it appears that a Nevada court would uphold an attorney's charging lien on property recovered in a divorce settlement even where the client contributed other property under the settlement agreement that arguably offset the value received.

In the case at bar, it is undisputed that Jimmerson represented the Debtor in the divorce proceeding, and that one of the disputed issues in the proceeding was the Debtor's interest in the 6760 Parcel. Pursuant to the Settlement Agreement, Tyson "recovered" Turner's interest in the 6760 Parcel. Pursuant to relevant case law, the fact that Tyson had to make payments under the Settlement Agreement does not counter the fact that he received property, on which Jimmerson could assert a charging lien.

Jimmerson's Lien Only Attaches to the 6760 Parcel

Jimmerson further contends that its charging lien attaches not only to the Debtor's interest in the 6760 Parcel but also to any property owned by the Debtor that was "involved" in the divorce case. Jimmerson asserts that it is "standard practice" in Nevada

[2] The Court can look to the law of other states for a rule of decision where there is no State authority on point. *Gilliam v. Roche Biomedical Lab., Inc.*, 989 F.2d 278, 280 n.3 (8th Cir. 1993); *Olympus Aluminum Prod., Inc. v. Kehm Enter., LTD.*, 930 F. Supp. 1295, 1310 (N.D. Iowa 1996).

for courts to recognize attorneys' liens on proceeds collected in the case or any real property belonging to the client located in Nevada. Jimmerson further argues that the firm also recovered the 6740 Property because it successfully defeated Turner's claim to the property. The Plan Administrator argues that the 6740 Parcel was purchased prior to the Debtor's marriage to Turner, and therefore that she had no colorable claim to it.

Nevada law grants a charging lien only on property "which is recovered on account of the suit . . . ." N.R.S. § 18.015(1)-(3). Thus, the relevant inquiry here would be what interest was recovered on behalf of the Debtor.

In the case at bar, the only "interest" recovered by the Debtor was Turner's one-half interest in the 6760 Parcel. Jimmerson claims that its lien is valid as to the 6740 Parcel because Turner made claims against it in the divorce. However, Turner never had a colorable interest in the property because it was purchased prior to the marriage, and there was no equitable interest for the Debtor to "recover." If it is "common practice" in Nevada, as Jimmerson asserts, to grant attorneys' liens on any real property belonging to the client located in Nevada, the firm has not cited any authority for the proposition. Under a fair reading of the Nevada law and the record in this case, Jimmerson's lien only attaches to the property actually recovered, which is the one-half interest in the 6760 Parcel that Turner ceded in the Settlement Agreement. Thus, Jimmerson's lien is only valid against the 6760 Parcel.

Jimmerson Timely Perfected Its Lien on the 6760 Parcel

The Plan Administrator argues that even if Tyson's acquisition of the 6760 Parcel constitutes a "recovery," Jimmerson did not properly perfect its charging lien and therefore holds no secured interest in the property. The Plan Administrator asserts that,

pursuant to N.R.S. § 18.015.3, only property that is "recovered" after service of the notice of lien can be attached. The Plan Administrator reasons that the 6760 Parcel was transferred pursuant to Settlement Agreement in 2002, that Jimmerson did not serve its notice of lien until April 23, 2003 and that Jimmerson did not timely perfect in accordance with applicable state law.

The Plan Administrator relies on *Schlang v. Key Airlines, Inc.*, 158 F.R.D. 666, 670 (D. Nev. 1994), and argues that it stands for the proposition that Nevada law requires notice to be provided prior to "settlement." In S*chlang*, the court held that a charging lien is valid only if notice is provided prior to the date that the property *is actually recovered*. *Schlang*; 158 F.R.D. at 670. The physical transfer of the relevant money or property is what constitutes "recovery" under Nevada law. The Court in *Schlang* held that an attorney failed to properly perfect his lien because the funds were already received and disbursed, not, as the Plan Administrator argues, because notice was made after a settlement agreement was signed. 158 F.R.D. at 670; see also *In re Nicholson*, 57 B.R. 672, 675 (Bankr. Nev. 1986) (holding attorney's lien not validly perfected where the money constituting the settlement fund was transferred prior to notice). Under Nevada law, the key event is the transfer of title or the transfer of funds.

In the case at bar, Jimmerson did not provide the statutorily required notices prior to the parties entry into the Settlement Agreement; however, it was not required to do so. Jimmerson needed only to provide the requisite notices before the transfer was effected. Thus, the charging lien was properly perfected because it was noticed well before the transfer of the 6760 Parcel into Tyson's name.[3]

[3] Jimmerson further asserts that "even if the notice had not been served until after recovery, the facts of this case merit a different result because there is a fundamental difference where land is the res that is

Jimmerson's Lien is Not Valid Against All Claims

Finally, the Court must consider the scope of the Jimmerson's lien. Jimmerson argues that its lien protects each of its four proofs of claim; even though Claim 51 is the only claim that relates to the relevant divorce proceeding. The Plan Administrator argues that Jimmerson cannot extend its lien to Claims 52, 53, and 54 because those representations were not related to the divorce and no property was even arguably recovered on behalf of the Debtor in those actions.

Jimmerson has not cited any Nevada authority for the proposition that a charging lien created pursuant to one cause of action also secures fees related to another cause of action. To do so would extend the lien beyond the property "recovered." Jimmerson relies on *Gordon v. Stewart*, 324 P.2d 234, 236 (Nev. 1958), but that court only held that the attorney's right to compensation is not limited to his lien, and that to so hold would "deprive him of any right to contract for other than a contingent fee, since no fee contract could ever be enforced save in event of a successful recovery to which a lien might attach." *Id.* (emphasis added); see also *Bradley v. Nevada Power Co., Inc.*, 185 F.3d 865 (9th Cir. 1999) (unreported) (construing Nevada law).

The Court must enforce the Nevada lien statute pursuant to its plain language. As stated above, Nevada lien law grants a charging lien upon "any claim, demand or cause of action . . . upon which a suit or other action has been instituted", but that lien only

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recovered." (Pl. Mot. at ¶ 41.) However, the Court need not reach that issue. It also need not reach the question whether the requirement of notice only affects the rights of third parties, not the client, and whether the Plan Administrator is a third party. See *People ex rel. MacFarlane v. Harthun*, 581 P.2d 716, 718 (Colo. 1978), which held that an attorney's charging lien attaches "immediately upon the obtainment of a judgment", giving "the attorney a lien on the judgment to the extent of his reasonable fees, remaining due and unpaid, for professional services rendered in obtaining the judgment." The Court continued, "Once a judgment is secured, as between attorney and client, nothing more need be done to cause the lien to be enforceable. However, before the lien can be enforced against *third* parties, notice must be given." (emphasis added).

attaches to "property which is recovered *on account of the suit* or other action." N.R.S. § 18.015(1), (3) (emphasis added). Because the Debtor did not recover any property in the lawsuits underlying claims 52, 53, or 54, Jimmerson is not entitled to a charging lien with respect thereto, and has at best an unsecured claim for its other bills.

CONCLUSION

For the reasons set forth above, the Court finds that Jimmerson has a valid attorneys' lien on the 6760 Parcel and that the lien secures proof of claim 51. However, the Court notes, as it did at oral argument, that Merrill Lynch also claims a lien on the 6760 Parcel and has commenced an adversary proceeding against the Debtor with respect thereto. The Court makes no finding as to the validity of the Merrill Lynch lien or its priority vis-à-vis the lien held by the Jimmerson firm.

Jimmerson shall settle an order on 10 days' notice to counsel for the Debtor, the Plan Administrator and Merrill Lynch.

Dated: New York, New York
August 26, 2005

/s/ Allan L. Gropper
UNITED STATES BANKRUPTCY JUDGE