

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK**

CASE NO. 98-20230

IN RE:

PAMELA R. MARASCO

Debtor.

DECISION & ORDER

BACKGROUND

On January 23, 1998, Pamela R. Marasco (the “Debtor”) filed a petition initiating a Chapter 7 case. On the Schedules and Statements required to be filed by Section 521 and Rule 7001, the Debtor indicated that: (1) she owed unsecured creditors \$46,684.22, of which 54.3% was as the result of unpaid medical bills, 23.4% was as the result of a deficiency after a December 1997 repossession and sale of a 1994 automobile and 22.3% was as the result of unpaid credit card obligations, legal fees, rent and other consumer services; (2) in November 1997 she had transferred her interest in a jointly held residential property located in New Jersey to her former spouse for \$13,300.00; (3) she had a \$3,000.00 judgment against her former matrimonial attorney for the return of a retainer against which no services had been performed; and (4) the \$3,000.00 retainer had been paid by her father.

On June 15, 1999, the “Trustee” filed a motion (the “Turnover Motion”) which requested an order compelling the Debtor to turnover the sum of \$3,000.00. The Motion alleged that: (1) the \$3,000.00 judgment had been paid to the Debtor by her former attorney on or about May 18, 1998; (2) although the funds for the retainer had come from her father, Harold T. Land (“Land”), when they were paid over to the Debtor’s former attorney they were either a gift or an unsecured loan to the

Debtor; (3) the \$3,000.00 was a non-exempt asset of the estate; and (4) the Debtor had refused to turn the \$3,000.00 over to the Trustee despite his demand.

On July 16, 1999, the Debtor interposed opposition to the Turnover Motion (the "Opposition")¹, which asserted that: (1) the \$3,000.00 retainer was forwarded to the Debtor's former attorney as a retainer for anticipated services in connection with the Debtor's then-pending divorce proceeding; (2) on or about August 14, 1997, a New Jersey fee arbitration committee (the "Committee") had issued a determination in the fee dispute proceeding pending between the Debtor and her former attorney which ordered that the attorney repay \$3,000.00 to the Debtor (the "Determination"); (3) the retainer had been paid to the Debtor's former attorney by a check from Land dated September 27, 1996²; (3) the money which the Debtor received from her former attorney pursuant to the Determination was not hers but was Land's because: (a) it had not been either a loan or a gift from Land to the Debtor; and (b) the funds had been held in escrow by the Debtor's former attorney pending her performing services for the Debtor; (4) because no services were provided by the former attorney, there was no benefit received by the Debtor from these monies, and therefore it was neither a gift nor a loan, and the funds at all times remained the property of Land; (5) the \$3,000.00 or any portion of it would only have been property of the Debtor when services were rendered by the former attorney; (6) it is only because it was the Debtor, and not Land, "that was harmed," that the fee dispute proceeding had to be brought in the name of the Debtor; and (6) if the \$3,000.00 had been paid on or before thirty days from August 14, 1997, as required by the

¹ The Affirmation in Opposition was by a partner in a law firm which was different than the law firm which represented the Debtor in her Chapter 7 case, and which indicated that the firm "represents the interests of Pamela R. Marasco in the above-captioned matter."

² The only notation on the check was that it was for "Divorce-Pam's."

Determination, the Debtor would have paid the money over to Land and the issue would have been moot.³

At oral argument on the Motion, the Court invited the parties to make written submissions setting forth any New Jersey statutory or case law, New Jersey Code of Professional Conduct rules or rulings or statutory or case law from any other jurisdiction which might support their respective positions. In the response to this invitation, the Debtor advised the Court that Rule 1.15(b) of the New Jersey Rules of Professional Conduct (“RPC”) indicated in part that: “Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or *third person* any funds or other property that the client or *third person* is entitled to receive.” No other legal authority was submitted to the Court by the parties.

DISCUSSION

The question before the Court is whether the Debtor had both a legal and beneficial interest in the monies that her former attorney had been ordered to pay over to her pre-petition, and which were paid to her post-petition, so that at the time of the filing of her petition the right to receive these monies and the monies when received were non-exempt property of the estate under Section 541 which the Debtor must turn over to the Trustee.

Based upon the evidence presented on the Turnover Motion, the Court finds that the Debtor’s right to receive these monies was property of the estate because the monies that her former attorney was holding were property in which the Debtor had both a legal and beneficial interest.

³ The Debtor would still have been required to list the fee dispute proceeding in her Statement of Affairs. When the Trustee learned the facts presented in this Motion, he would have sought to recover the \$3,000.00 as an avoidable preferential transfer or fraudulent conveyance.

There is no dispute that Land forwarded \$3,000.00 to the Debtor's former attorney to pay the retainer which was required by that attorney to perform services for the Debtor in connection with her divorce.⁴ However, other than the Debtor's ambiguous statement in her schedules that it was her father's money (it clearly was at one time), there has been no other evidence presented to the Court to support a finding that when Land forwarded the funds to the Debtor's former attorney he did not transfer the legal and beneficial title in the funds to the Debtor.

There is no evidence that: (1) Land advised the Debtor's former attorney that he retained the legal and beneficial interest in the funds so that any unused portion of the retainer should be returned directly to him; (2) Land instructed the Debtor's former attorney to perform the services for the Debtor but consider him the client for billing purposes in order to insure that he would receive at least copies of all bills for his review and authorization to the extent that there was any application of the \$3,000.00 for services performed; (3) the Debtor's former attorney was holding the retainer in the name of and for the account and benefit of anyone other than the Debtor; (4) there was any statute, case law or written agreement between the Debtor and Land which placed the Debtor in any fiduciary capacity with respect to the funds; (5) Land took any of the steps necessary to obtain a perfected security interest in the retainer being held in the name of and for the account and benefit of the Debtor; or (6) any actions had been taken by the Debtor or Land in connection with the fee dispute proceeding to advise the Committee that Land had retained legal and beneficial title to the retainer funds so that any decision that resulted in all or a portion of the retainer being returned by the Debtor's former attorney would require that it be returned directly to Land.

⁴ There is no evidence before the Court as to whether the retainer agreement between the Debtor and the attorney was an oral or written agreement.

What the evidence does show is that: (1) the Debtor maintained the fee dispute proceeding in her name to obtain the return of the unused retainer; (2) the fee dispute Determination required the unused retainer to be returned directly to the Debtor; and (3) the payment of the unused retainer was made directly to the Debtor by her former attorney.

As a result, the Court can only conclude that when Land forwarded the \$3,000.00 without any restrictions, he also transferred legal and beneficial title to the funds to the Debtor for her unrestricted benefit and on her account, to be utilized by her in connection with the retainer agreement she had entered into with her former attorney, with any rights in the retainer, as between the Debtor and her attorney, to be governed by that agreement and any applicable law regarding such retainers.

Rule 1.15(b) of the RPC, as correctly pointed out by the Trustee, does not answer the question that is at issue on this Motion, which is who has the title and right to the property. The Rule simply requires an attorney to deliver any property he or she is holding to the party who is entitled to it.

CONCLUSION

The Turnover Motion of the Trustee is in all respects granted. The Debtor is ordered to pay to the Trustee the sum of \$3,000.00, which sum represents non-exempt property of the estate which the Debtor received post-petition, within twenty (20) days from entry of this Decision & Order. If the Debtor fails to pay as required, the Trustee shall have judgment for \$3,000.00, which shall be without prejudice to any other or further rights and remedies the Trustee may have.

