UNITED STATES BANKRUPTCY COURT

WESTERN DISTRICT OF NEW YORK NOT FOR PUBLICATION

In re

Won Sam Yi Case No. 18-10603 K

Debtor

DECISION AND ORDER

The present matters were discussed and argued on the record in open court on July 10, 2019. The Court has selected one very narrow issue from among many difficult issues presented in this Motion and Cross-Motion and in the Objections and Replies. It has done so because the IRS has persuasively argued that its Cross-Motion turns on a simple point of law, and asserts that if the Court were to agree with the IRS's argument as to that point, the rest of the matters currently before the Court could very well become academic.

The exigencies of this matter do not permit the Court adequate time to write a decision that would be sufficiently explanatory as to background, posture, arguments, discussion, etc., so as to be marked "FOR PUBLICATION."

The issue is "Must Mr. Scher (who is not a bankruptcy lawyer and is not accused of any violation of Bankruptcy Code or Rules or anything else) return the $50,000 that he received from Yi (originating from his 401(k) account), for the benefit of the IRS, as it argues in its Cross-Motion?" If the answer is "yes", then the primary Motion at Bar – whether a certain insurance

premium refund may be used by the Debtor to continue to retain Mr. Scher[1] - - might be unacceptable to Mr. Scher, even if the Court would approve that use.[2]

The Court finds that unless Yi can convince the Court otherwise,[3] Yi's transfer of $50,000 to Mr. Scher did not cleanse those two $25,000 transfers of the IRS ' purported lien. The remedy shall be left for negotiation, as discussed below.

FACTOR ONE

The IRS' prosecution of a lien on Yi's 401(k) was persistent and zealous throughout extensive negotiations over a long period of time. Its insistence that its claimed lien be honored and that there be no withdrawals from the 401(k), was presented in writing to Yi's proposed D-I-P counselor no later than September 24, 2018 (which was before the first $25,000 withdrawal from the 401(k) on October 5).

This was important in the IRS opposition to the Debtor's retention of his bankruptcy counsel because the 401(k) was implicated. (It seems clear that the IRS was not aware of Mr. Scher.) The IRS moved for ratification of its lien on the 401(k) funds on July 3, 2018. The Stipulation of November 20, 2018 obtained a benefit for the Debtor - - the IRS "Motion to

[1] The Debtor is a licensed physician whose license is at issue in a regulatory proceeding that is next to be heard (this Court has been told) in August. The Debtor's counsel at that hearing (Mr. Scher) is waiting for an answer.

[2] The Chapter 11 Trustee of the Estates of two insiders of the Debtor (CCS Oncology, PC and CCS Medical, PLLC) asserts that the insurance premium refund does not belong to this Debtor. The Trustee does not assert a claim to the $50,000 that Mr. Scher received, however. Moreover, the IRS does not assert a lien on the insurance premium refund that is the subject of the present "Motion".

[3] Again, the Court is not rendering a decision on the IRS lien issue. The Motion is seeking the Court's permission for Yi, as a D-I-P, to hire Mr. Scher, using $25,000 of a malpractice insurance premium refund. This led to the objections by the UST and IRS to the failure of the D-I-P to seek approval of the Court at the time of the retention and payments to Mr. Scher and their arguments that the moneys should be disgorged.

Determine if Stay was Violated" was withdrawn (without prejudice), and also the Debtor obtained his choice of counsel.

Now the Debtor brings back his §362 objections to the placement of the IRS liens.[4] Implicit in that is his notion that §362 polemics absolve him of fault in his making two $25,000 withdrawals from his 401(k) account. The Court rejects that notion.

The Court always presumes that a Chapter 11 Debtor-in-Possession - - a statutory fiduciary- - was capably advised by his proposed D-I-P counselor. Consequently, the Court finds that Yi's two $25,000 withdrawals from his 401(k) account violated what the Court presumes was his bankruptcy counsel's proper and correct advice in light of the IRS' written assertion of a lien on the 401(k) account.

FACTOR TWO

As the U.S. Trustee argued (joined in by the IRS), Rule 2016 does not exempt the hiring of an attorney from disclosure requirements simply because the source of funds is not "Property of the Estate". And as the UST and IRS have also asserted, proper disclosure would have elicited inquiries and possible objections before Mr. Scher relied upon receipt of each $25,000 retainer payment. (Again, there is nothing offered that might clearly place the failure of disclosure on Mr. Scher, rather than on the Debtor.)

FACTOR THREE

Assuming for the sake of argument that Mr. Scher was totally in the dark as to Dr. Yi's Chapter 11 case and as to the source of the $50,000 he received, and of IRS' claimed liens, the

[4] Arguably the Debtor is barred by judicial estoppel to resurrect the "violation of stay" argument. See *In re* A*delphia Recovery Trust*, 634 F. 3d 678 (2d Cir. 2011). (The Court does not rest this Decision on that basis, however.)

remaining question is whether the Court should exercise its discretion as to the violations of the Rule 2016 disclosure requirements, and his seeming defiance of *prima facie* IRS lien claims, in such a way as would cause harm to Mr. Scher?

We have no doubt that Yi will be personally liable for any reasonable fees properly sought by Mr. Scher in some other forum if this case fails, given Yi's personal Chapter 11 case, and what the IRS has asserted might tally $5 million in lien claims, we come back to why this ruling might moot the balance of the argument surrounding the present Motion. The Court has no idea whether Mr. Scher would be willing to continue to represent Dr. Yi in his efforts to save Dr. Yi's medical license, even if it were to approve the use of the insurance refund to substitute $25,000 for the $50,000 that he must refund.

The IRS, through DOJ, argued passionately on July 10th that in the Court's exercise of its discretion, the equities favor the IRS, not Mr. Scher. The Court agrees, but only up to a point. He is a veteran lawyer. He has his choice of clients, and cannot claim that he had no opportunity to learn about Yi as a possible client.

The IRS, for its part, has regularly asserted a total claim of about $5 million. It is an "involuntary creditor," as is often the case as to taxing entities. It seeks disgorgement of $50,000 of what it asserts to be collateral securing a debt of approximately $5,000,000. Thus, it is merely 1% of its claim. However, it seems highly likely that assets available to the IRS are far less than $5,000,000. Consequently, $50,000 may be a significant portion of what it might ultimately recover.

In his March 25, 2019 Declaration, Mr. Scher states that "the prior retainers have been extinguished." (¶10) The Court takes that to mean that the $50,000 is not sitting in a trust account, but rather was expended or otherwise utilized in the ordinary course of his law practice.

Assuming, again, that he was an innocent victim of Yi's decision to divert §401(k) monies that he (Yi) is charged with knowing were contested by the IRS, equity requires consideration as to Mr. Scher's convenience in returning the money to the Estate (not turning over to the IRS).[5] That is left for negotiation among the parties and the U.S. Trustee.

The Court, *sua sponte*, makes an 11 USC §503(b)(3)(D) finding that if Scher continues to represent the Debtor despite this Decision, and achieves success, he will be viewed as a "Creditor…[who made] a substantial contribution" to this case, entitled to reasonable compensation as an expense of administration (assuming that the Estate has not become administratively insolvent).

IT IS SO ORDERED.

Dated: Buffalo, New York
July 25, 2019

/s/ Michael J. Kaplan
U.S.B.J.

[5] No authority has been cited for the proposition, argued by the U.S., that the money should be paid to the IRS, rather than to the estate, subject to protections for the IRS.