

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

IN RE:

A. LEE TURBERVILLE, JR.,
JANET L. TURBERVILLE,

CASE NO. 02-13054-WSS

Debtors.

Chapter 7

**ORDER APPROVING APPLICATION TO EMPLOY
SPECIAL COUNSEL FOR TRUSTEE AND OVERRULING
OBJECTION OF DPF ARCHITECTS, INC.**

A. Richard Maples, Jr., Counsel for the Trustee
Jeffery J. Hartley, Counsel for DPF Architects, Inc.
Irvin Grodsky, Counsel for the Debtors

This matter came before the Court on the Trustee's application to employ Ray Thompson as special counsel for the Trustee, and the objection of DPF Architects, Inc. to the application.

The Court heard oral arguments on the matter on October 1, 2002 and allowed counsel to submit supplemental letter briefs. After due consideration of the pleadings, arguments of counsel, and supplemental letter briefs, the Courts finds as follows:

The Debtor, A. Lee Turberville, Jr., filed his Chapter 7 petition on May 31, 2002. He presently has an appellate case before the Supreme Court of Alabama, Case No. 1011206, DPF Architects, P.C. v. A. Lee Turberville, Jr. The Trustee seeks to employ Ray M. Thompson ("Thompson") as additional special counsel to represent him in the appellate case. Thompson represented the Debtor in the trial of the case now on appeal, and is therefore extremely knowledgeable of the facts and legal issues in the case. The Debtor owes Thompson fees and expenses for his prior representation at the trial level. Thompson claims an attorney's lien for the amounts due for the trial work to the extent that a judgment in favor of the Debtor is affirmed

and paid by the Defendants. Thompson received \$36,668.49 in partial liquidation of his attorney's lien on or about February 28, 2002 from funds paid into court by the Defendants in that litigation.

DPF Architects, Inc. ("DPF"), a creditor in the Debtor's case, objected to the Trustee's application to employ Thompson, claiming that Thompson has an "adverse interest" to the estate under 11 U.S.C. § 327(e) on two grounds.¹ First, Thompson's attorney's lien against any proceeds from the state court litigation is adverse to the estate because the lien would decrease any funds available to be distributed to unsecured creditors. Second, the February 28, 2002 payment could be subject to an avoidance action pursuant to 11 U.S.C. §§ 545, 547, 548 or 549 because the payment was made approximately 90 days before the bankruptcy filing.

Section 327(e) of the Bankruptcy Code governs the employment of special counsel for the debtor or the estate. Under its terms, "the trustee, with the court's approval, may employ, for a specified purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse the debtor or to the estate with respect to the matter on which such attorney is to be employed." It is generally held that special counsel employed under §327(e) can be a creditor of the estate for fees related to pre-petition representation. *DeVlieg-Bullard, Inc. v. Natale (In re DeVlieg, Inc.)*, 174 B.R. 497, 503 (N.D. Ill. 1994), *appeal dismissed*, 56 F.3d 32 (7th Cir. 1995); *In re Covenant Financial Group of America*, 243 B.R. 450, 458 fn.11 (Bankr. N.D. Ala. 1999) ("Often times a trustee may seek to employ an attorney to represent the estate

¹DPF cited 11 U.S.C. §327(a) in its original objection; however, counsel for DPF addressed §327(e) in his oral argument and supplemental brief.

in a cause of action designed to generate a recovery of money or property for an estate where the attorney is a creditor of the estate, In those circumstances, the interests of the bankruptcy estate are parallel with or identical to, rather than adverse to, the interests of the attorney and the other parties that he or she represents.”)

DPF asserts that Thompson’s attorney lien creates an adverse interest to the estate. According to DPF, Thompson’s claim to a portion of the recovery from the state court litigation will deplete the estate, making less money available for unsecured creditors. While Thompson’s lien may prevent him from being named as general counsel for the Debtor under 11 U.S.C. §327(a), having a claim against the estate does not disqualify Thompson from serving as special counsel under 11 U.S.C. §327(e). In *In re Cockings*, 195 B.R. 735, 737 (Bankr. E.D. Ark. 1996), the bankruptcy court allowed an attorney with an attorney’s lien to represent the debtor as special counsel under 11 U.S.C. §327(e). The court noted that §327(e) has fewer restrictions to employment than §327(a). “The purpose of [§327(e)] is to permit the Court to evaluate actual or potential conflicts or adverse interests.” *Id.* (citing *In re American Thrift & Loan Association*, 137 B.R. 381 (Bankr. S.D. Cal. 1992). “In most situations under section 327(e), the special counsel has a contingency fee or similar arrangement by which they expect to be paid from the proceeds of the litigation. Were an attorney’s monetary interest in the outcome of the litigation a conflict, the purpose of the rule would be severely and unnecessarily restricted.” *Id.* See also *In re Statewide Pools, Inc.*, 79 B.R. 312, 314-15 (Bankr. S.D. Ohio 1987). This Court agrees and therefore finds that Thompson’s attorney’s lien is not an impediment to the Trustee’s application to employ him as special counsel.

DPF also maintains that Thompson is disqualified from serving as the Trustee’s special

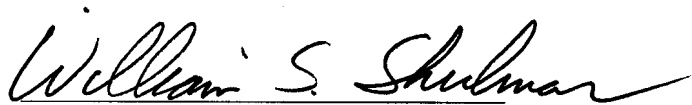
counsel due to a potential preference/avoidance action. As stated above, Thompson received approximately \$37,000.00 in February 2002 from funds deposited with the state court. The Trustee states that the \$37,000.00 payment is not subject to avoidance under §§544, 547 or 548 because there was fair consideration for the transfer and Thompson's lien arose prior to the bankruptcy petition, entitling him to enforce his lien to that extent. Even if the Trustee were to pursue a preference action against Thompson, the action would not necessarily be adverse to the state court appellate work that Thompson is sought to provide as special counsel. Should Thompson have to disgorge the February 2002 payment for the benefit of the estate, he would be even more motivated to win on appeal. This is not to say that a potential preference action could not disqualify a candidate for special counsel under §327(e); however, the language of §327(e) leads the Court to believe each case should be evaluated on its individual facts. The bankruptcy court in *In re Servico, Inc.*, 149 B.R. 1009, 1013-14 (Bankr. S.D. Fla. 1999) found no violation of §327(e) by special counsel for the debtor which had received a potential preference payment. Although the facts of the *Servico* case are different from the present case, it illustrates the need to examine each case individually to determine if there is truly an adverse interest to the estate. Such examination supports the purpose of §327(e) to allow the debtor or the subsequent trustee to retain the same counsel for complex litigation when changing counsel in the middle of the case would be harmful and costly to the estate. See H.R.Rep. No. 595, 95th Cong., 1st Sess. at 328 (1977); S.Rep. No. 595, 95th Cong., 2nd Sess.at 38-39 (1978), U.S. Cong. & Admin. News 1978, pp. 5787, 5824-5825, 6284-6285. ("The subsection will most likely be used when the debtor is involved in complex litigation, and changing attorneys in the middle of the case after the bankruptcy case has commenced would be detrimental to the progress of that other litigation.")

Based on the foregoing, the Court finds that allowing Thompson to serve as special counsel for the Trustee in the state court appeal is in the best interest of the estate and that Thompson holds no adverse interest to the Debtor or the estate regarding the state court appeal. Therefore, the Court finds that the Trustee's application to employ Thompson as special counsel under §327(e) should be granted, and DPF's objection to the application should be overruled. It is hereby

ORDERED that the Trustee's application to employ Ray Thompson as special counsel for the Trustee is **GRANTED**, and Thompson shall seek further approval from this Court as to any future payment of attorney's fees; and it is further

ORDERED that the objection of DPF Architects, Inc. to the application is **OVERRULED**.

Dated: April 22, 2003


WILLIAM S. SHULMAN
CHIEF U.S. BANKRUPTCY JUDGE