

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION

In re:  
BENNIE WHITLOCK,  
*Debtor.*

Case No.: 17-1558-JCO  
Chapter 13

ORDER

This matter has been before the Court for a hearing multiple times, but most recently on January 30, 2019 on the issue of whether special counsel's attorney fees in prosecuting Debtor's personal injury case can be paid from the proceeds of the settlement where the secured creditor was not served with the application to employ special counsel. At the hearing, appearances were noted for the record. The matter has been fully briefed and is ripe for determination.

The Court finds that the lack of service on the secured creditor prevents special counsel's attorney fees from being paid out of the settlement proceeds.

Debtor filed this chapter 13 case on April 25, 2017. At the time of the petition, Debtor was indebted to Santander Consumer USA, Inc., (hereinafter "Santander"), with regards to a 2014 Dodge Ram 1500 Pickup Truck (hereinafter "the vehicle"). Debtor listed Santander in his plan as a secured creditor and proposed to pay Santander through his chapter 13 case. On or around September 8, 2017, Debtor was injured in an automobile accident (hereinafter "the accident") and the vehicle was deemed a total loss. On or around January 11, 2018, Santander transferred its claim to Wollemi Acquisition, LLC, (hereinafter "Wollemi"). On March 12, 2018, Debtor, through counsel, filed an Application for Employment of Attorney as a professional person along with a Verified Statement of Disinterestedness, to represent the Debtor in relation to the motor vehicle accident on September 8, 2017.

The Application for Employment was not served on Wollemi, even though a Notice of Transfer of Claim from Santander to Wollemi was on the record. The Application to Employ

was served only on the Chapter 13 Trustee. (Doc. 48 at 3). The balance owing to Wollemi on the vehicle at the time of the accident was \$27,627.97. The insurance company for the at fault party offered to settle Debtor's property claim for \$22,095.27. Wollemi had no knowledge of the accident and had no knowledge of special counsel representing Debtor regarding the accident. The contract Debtor signed with special counsel proposed to keep not only one third of the personal injury claim, but also one third of the property damage claim.

On or about September 20, 2018, Debtor filed a Motion for Court Approval of a Settlement and Approval of Attorney's Fee (Doc. 79). The certificate of service reflected service of the Motion was made upon the Chapter 13 Trustee, Allen Trippe as attorney for Santander, and Thomas Boller as attorney for the University of South Alabama. Wollemi was not served with the Motion.

#### Law and Application

This is a contested matter pursuant to Rule 9014 of the Bankruptcy Rules of Procedure. Rule 9014 provides that reasonable notice and opportunity for hearing on a motion shall be afforded the party against whom the relief is sought in the motion. Fed. R. Bankr. P. 9014(a). Subsection (b) of Rule 9014 states that Rule 7004 of the Bankruptcy Rules governs how contested matters are to be served. Rule 7004(b)(3) provides that service may be made

Upon a domestic or foreign corporation or upon a partnership or other unincorporated association, by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

Fed. R. Bankr. P. 7004(b)(3).

Special counsel argues that a quasi-contract, also known as an implied contract, exists between him and Wollemi which would provide for payment of the reasonable value of his services to be paid from the settlement proceeds belonging to Wollemi. Special counsel relies on

the case, *Frank Crain Auctioneers, Inc., v. Delchamps*, 797 So.2d 470 (Ala. Civ. App. 2000), which stands for the proposition that “if one knowingly accepts services rendered by another, and the benefit and result thereof, the law implies a promise on the part of the one who so accepts with knowledge, to pay the reasonable value of such services rendered.”

Wollemi argues that because it did not have knowledge of the contract, nor was it provided with the opportunity to object to the terms of employment, special counsel’s fee should not be paid from the said proceeds and Wollemi should receive the full amount of settlement proceeds. This Court agrees.

The facts of this case are undisputed. At the time Debtor filed the Application to Employ, the debt had already been transferred from Santander to Wollemi. Wollemi was unrepresented by an attorney when the Application was filed, and Santander was not the agent of Wollemi. It is undisputed that Wollemi did not receive service of the Application or the Motion, and therefore was not afforded the opportunity to object to the Application to Employ special counsel as contemplated by the Rules of Bankruptcy Procedure. Because Wollemi did not receive proper service on either filing, the Court finds that special counsel’s attorney’s fees SHALL not be paid out of the settlement proceeds.

Dated: April 15, 2019



JERRY C. OLDSHUE, JR.  
U.S. BANKRUPTCY JUDGE