

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 00-33994

SJI WHOLESALE, INC.
d/b/a SJI TOBACCO

Debtor

**MEMORANDUM ON MOTION TO REQUIRE PAYMENT
OF SECURED CLAIM AND OBJECTION TO CLAIM**

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RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

Before the court are the following contested matters: (1) the Motion to Require Payment of Secured Claim of Luedeka, Neely & Graham, P.C. (Motion for Payment) filed on December 3, 2003, by the law firm of Luedeka, Neely & Graham, P.C.; and (2) the Objection to Claim filed by the Chapter 7 Trustee, Sterling P. Owen, IV, on March 11, 2004, as amended by the Trustee's Amended Objection to Claim filed on April 14, 2004, requesting that the court disallow the claims filed by Luedeka, Neely & Graham, P.C. on January 23, 2001, November 20, 2001, and April 23, 2002. The January 23, 2001, and November 20, 2001 claims were filed as nonpriority unsecured claims in the identical amounts of \$167,117.16. The April 23, 2002 claim was also filed in the amount of \$167,117.16 but of this amount \$23,500.00 was claimed as secured.

The issues before the court, as defined in the Pretrial Order prepared by the parties and entered on June 1, 2004, are (1) whether Luedeka, Neely & Graham, P.C. is a secured creditor of the Debtor, and (2) if secured, whether the Debtor's estate must pay \$23,500.00 in proceeds received from American Case and Luggage Company d/b/a American Western Cigar Company pursuant to an Order to Approve Compromise entered on September 23, 2003.¹

¹ The June 1, 2004 Pretrial Order raises no issue as to Luedeka, Neely & Graham, P.C.'s status as a nonpriority unsecured creditor. Furthermore, written Stipulations filed by the parties on July 8, 2004, recite that "Luedeka, Neely & Graham, P.C. performed services for SJI Wholesale, Inc. . . . in the total amount of \$167,117.16." Accordingly, the court will overrule the Trustee's Objection to Luedeka, Neely & Graham, P.C.'s \$167,117.16 nonpriority unsecured claim filed on January 23, 2001, but will sustain the objection as to the duplicate nonpriority unsecured claim filed on November 20, 2001.

An evidentiary hearing is not required and all issues will accordingly be resolved on Stipulations filed by the parties on July 8, 2004. The Trustee filed his Brief in Support of the Trustee's Objections to Claim of Luedeka, Neely & Graham, P.C. on July 21, 2004, and Luedeka, Neely & Graham, P.C. filed its Brief in Support of Creditor's Motion to Require Payment of Secured Claim on July 30, 2004.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(B) (West 1993).

I

On March 22, 2000, the Debtor filed a verified Complaint commencing a patent and/or trademark infringement lawsuit under the Lanham Act against Alfred J. Berger, DSI Limited, and American Case and Luggage Company d/b/a American Western Cigar Company, Case No. C-1-00-225, in the United States District Court for the Southern District of Ohio, Western Division, at Cincinnati (Ohio Lawsuit). By the Ohio Lawsuit, the Debtor claimed that the defendants were using its trademarks for Celestino Vega, Rumrunner, Island Amaretto, and West Indies Vanilla cigars. In conjunction with the Complaint, the Debtor also filed a Motion for Preliminary Injunction and requested an expedited hearing. The firm of Luedeka, Neely & Graham, P.C., a law firm specializing in the area of patents and trademarks, through attorneys Mark Graham, Esq. and Robert Fox, Esq., represented the Debtor pro hac vice in the Ohio Lawsuit.

The hearing on the Motion for Preliminary Injunction in the Ohio Lawsuit was held July 24 through July 26, 2000, and on July 28, 2000, the district court entered an Order

Denying SJI Wholesale, Inc.'s Motion for Preliminary Injunction. The primary basis for denying the preliminary injunction was the court's determination that "SJI has failed to demonstrate a strong or substantial likelihood of success on the merits because AWC has provided clear and convincing evidence that in a proceeding on the merits Caribbean would be found to have abandoned the disputed marks." STIP. EX. A. This order was not appealed by the Debtor.

On October 3, 2000, the Debtor filed the Voluntary Petition commencing its bankruptcy case under Chapter 11 of the Bankruptcy Code. The bankruptcy case was converted to Chapter 7 on October 26, 2001, and Sterling P. Owen, IV was appointed trustee. On November 2, 2001, the Trustee filed an Application to Employ the McCord Law Firm, which was approved by the court on November 13, 2001. Luedeka, Neely & Graham, P.C. did not represent the Debtor in its bankruptcy case. In the Ohio Lawsuit, Mr. Graham and Mr. Fox filed a Motion for Application to Withdraw as Co-counsel on March 12, 2001, and subsequently, on March 19, 2001, the district court judge entered a Proposed Order granting the motion to withdraw.

On April 1, 2002, the Trustee filed (1) the Motion to Approve Compromise and (2) the Trustee's Motion for Authorization to Sell Property Free and Clear of Other Interests and/or Liens. The Trustee requested approval of a proposed sale of all the Debtor's assets to American Case and Luggage Company, d/b/a American Western Cigar, a defendant in the Ohio Lawsuit, at a total sale price of \$88,682.00. Of this amount, \$23,500.00 was attributed to settlement of the Ohio Lawsuit. The Agreed Order Approving Compromise and the Agreed

Order Approving Sale were entered in the Debtor's Chapter 7 bankruptcy case on May 30, 2002 (collectively, the May 30, 2002 Orders).

On July 23, 2001, Luedeka, Neely & Graham, P.C. filed an unsecured proof of claim in the amount of \$167,117.16, representing the amount of its legal fees and expenses incurred in the Ohio Lawsuit. This proof of claim was marked as Claim No. 24. An identical unsecured proof of claim, marked as Claim No. 44, was filed by Luedeka, Neely & Graham, P.C. on November 20, 2001. Luedeka, Neely & Graham, P.C. filed its third proof of claim in the amount of \$167,117.16, which was marked Claim No. 62. In this claim, Luedeka, Neely & Graham, P.C. asserted an attorney's lien on the \$23,500.00 received by the Trustee in the court-approved compromise of the Ohio Lawsuit, claiming a security interest therein pursuant to Tennessee Code Annotated section 23-2-102 (1994) and/or any applicable Ohio statute. Luedeka, Neely & Graham, P.C. then filed the Motion for Payment concerning Claim No. 62 on December 3, 2003. The Trustee filed his Response to the Motion for Payment on January 7, 2004, disputing that Luedeka, Neely & Graham, P.C. was entitled to the Ohio Lawsuit proceeds.

Thereafter, on March 11, 2004, the Trustee filed the Objection to Claim, seeking to disallow Claim No. 24 and Claim No. 44 as they are duplicate claims, amended by Claim No. 62.² With respect to Claim No. 62, the Trustee seeks to disallow it as secured and to allow it in its entirety as a general unsecured claim. In support of his Objection to Claim, the

² See *supra* n.1.

Trustee argues that Luedeka, Neely & Graham, P.C. does not have an attorney's lien under either Tennessee or Ohio law, and accordingly, it holds an unsecured claim.

II

In Chapter 11 cases, “[a] proof of claim or interest is deemed filed under section 501 of this title for any claim or interest that appears in the schedules filed . . . , except a claim or interest that is scheduled as disputed, contingent, or unliquidated.” 11 U.S.C.A. § 1111(a) (West 1993); *see also* FED. R. BANKR. P. 3003(c) (governing the filing of Chapter 11 proofs of claim). “A proof of claim executed and filed in accordance with [the Bankruptcy Rules] shall constitute prima facie evidence of the validity and amount of the claim.” FED. R. BANKR. P. 3001(f). Nevertheless, § 502, concerning the allowance of claims, provides that “[a] claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest . . . objects.” 11 U.S.C.A. § 502(a) (1993). Rule 3007 addresses objections to claims, providing that

An objection to the allowance of a claim shall be in writing and filed. A copy of the objection with notice of the hearing thereon shall be mailed or otherwise delivered to the claimant, the debtor or debtor in possession and the trustee at least 30 days prior to the hearing. If an objection to a claim is joined with a demand for relief of the kind specified in Rule 7001, it becomes an adversary proceeding.

FED. R. BANKR. P. 3007.

The Trustee, as the objecting party, “bears the burden of going forward and presenting evidence to rebut or cast doubt upon, the creditor’s proof of claim. [His] burden is to produce evidence which, if believed, would refute at least one of the allegations that is

essential to the claim's legal sufficiency." *In re Giordano*, 234 B.R. 645, 650 (Bankr. E.D. Pa. 1999) (quoting *Galloway v. Long Beach Mortgage Co. (In re Galloway)*, 220 B.R. 236, 243-44 (Bankr. E.D. Pa. 1998)). Once met by the Trustee, it shifts to Luedeka, Neely & Graham, P.C. to prove the validity of Claim No. 62 by a preponderance of the evidence. *Giordano*, 234 B.R. at 650 ; see also *In re Walsh*, 264 B.R. 482, 484 (Bankr. N.D. Ohio 2001); *Namer v. Sentinel Trust Co. (In re AVN Corp.)*, 248 B.R. 540, 547 (Bankr. W.D. Tenn. 2000).

The parties do not dispute that Luedeka, Neely & Graham, P.C. is a creditor of the Debtor, having performed legal services for the Debtor in the Ohio Lawsuit. Likewise, the parties do not dispute that the legal fees and expenses incurred as a result of the Ohio Lawsuit totaled \$167,117.16, and that amount is still due and owing to Luedeka, Neely & Graham, P.C. The dispute centers around whether Luedeka, Neely & Graham, P.C. is a secured creditor, holding a valid attorney's lien under Tennessee and/or Ohio law. If so, the court must determine whether Luedeka, Neely & Graham, P.C. is entitled to payment of the \$23,500.00 compromised proceeds. If not, the inquiry ends, as Luedeka, Neely & Graham, P.C. is a general unsecured creditor to the extent of its \$167,117.16 claim and is entitled only to any pro rata distribution from the Chapter 7 bankruptcy estate.

III

The primary question is whether Luedeka, Neely & Graham, P.C. holds a valid attorney's lien against the \$23,500.00 settlement proceeds. Luedeka, Neely & Graham, P.C. correctly argues that Tennessee recognizes attorney's liens, as follows: "Attorneys and

solicitors of record who begin a suit shall have a lien upon the plaintiff's or complainant's right of action from the date of the filing of the suit.” Tenn. Code Ann. § 23-2-102. “This lien ‘attaches to any proceeds flowing from a judgment, as long as the lawyer worked to secure that judgment for the client.’” *Schmitt v. Smith*, 118 S.W.3d 348, 351 (Tenn. 2003) (quoting *Starks v. Browning*, 20 S.W.3d 645, 651 (Tenn. Ct. App. 1999)).

There is no basis for Luedeka, Neely & Graham, P.C.’s assertion of an attorney’s lien under Tennessee law. The services from which the legal fees and expenses upon which its claim is based arose in the Ohio Lawsuit. As such, any attorney’s lien thereon would be subject to Ohio, not Tennessee law. Moreover, even if Luedeka, Neely & Graham, P.C. could assert an attorney’s lien under Tennessee law, it would not be entitled to assert the lien with regards to the \$23,500.00 compromise. The proceeds from the compromise flowed from the May 30, 2002 Orders, entered by this court, and Luedeka, Neely & Graham, P.C. was not a party to those Orders. It has never been employed by the Debtor or the Trustee in connection with the Debtor’s bankruptcy case, during either the Chapter 11 or the Chapter 7 administration. Additionally, it disassociated itself with the Ohio Lawsuit on March 19, 2001, when it withdrew as counsel of record in that case.

IV

There is no statutory basis for an attorney’s lien in Ohio. Nevertheless, Ohio courts do recognize equitable attorney’s liens: retaining liens and charging liens. *Putnam v. Hogan*, 701 N.E.2d 774, 775 (Ohio Ct. App. 1997). Luedeka, Neely & Graham, P.C. is seeking a charging

lien in this case, i.e., a lien “upon a judgment, decree, or award obtained for a client.”

Putnam, 701 N.E.2d at 775-76. Charging liens are allowed as follows:

The right of an attorney to payment of fees earned in the prosecution of litigation to judgment, though usually denominated a lien, rests on the equity of such attorney to be paid out of the judgment by him obtained, and is upheld on the theory that his services and skill created the fund.

First Bank of Marietta v. Roslovic & Partners, Inc., No. 03AP-332, 2004 Ohio App. LEXIS 2401, at *28, 2004 WL 1172885, at *10 (Ohio Ct. App. May 27, 2004) (citing *Cohen v. Goldberger*, 141 N.E. 656 (Ohio 1923)).³ It is within the sound discretion of the court whether to allow an equitable attorney’s lien. *Minor Child of Zentack v. Strong*, 614 N.E.2d 1106, 1108 (Ohio Ct. App. 1992).

Luedeka, Neely & Graham, P.C. is not entitled to an attorney’s lien under Ohio law. The firm withdrew from its representation of the Debtor in the Ohio Lawsuit in March 2001. The Trustee negotiated the settlement of the Ohio Lawsuit within his administration of the Debtor’s bankruptcy case, with no assistance from Luedeka, Neely & Graham, P.C. at any level other than its original filing of the Ohio Lawsuit. The Ohio Court of Appeals has held that such activity is not sufficient to establish an equitable attorney’s lien on judgment proceeds. See *First Bank of Marietta*, 2004 Ohio App. LEXIS 2401, at *36-37.

³ Ohio courts also recognize retaining liens, which “attach[] to all property, papers, documents, and monies of the client which come into the attorney’s possession during the course of his representation. A retaining lien is a ‘passive lien,’ as an attorney cannot actively enforce it; instead the attorney must wait until the client, out of embarrassment or inconvenience, agrees to pay his attorney any fees which are owed in exchange for the return of the property.” *Putnam*, 701 N.E.2d at 775.

Because Luedeka, Neely & Graham, P.C. does not have a valid attorney's lien under either Tennessee or Ohio law, it does not hold a secured claim. Luedeka, Neely & Graham, P.C. is a general unsecured creditor of the Debtor, entitled to a pro rata distribution, if any, along with other general unsecured creditors.

An order consistent with this Memorandum will be entered.

FILED: August 25, 2004

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
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In re

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SJI WHOLESALE, INC.
d/b/a SJI TOBACCO

Debtor

ORDER

For the reasons set forth in the Memorandum on Motion to Require Payment of Secured Claim and Objection to Claim filed this date, the court directs the following:

1. The Motion to Require Payment of Secured Claim of Luedeka, Neely & Graham, P.C. filed by Luedeka, Neely & Graham, P.C. on December 3, 2003, is DENIED.

2. The Objection to Claim filed by the Chapter 7 Trustee, Sterling P. Owen, IV, on March 11, 2004, as amended on April 14, 2004, is SUSTAINED in part and OVERRULED in part as follows:

A. To the extent the Trustee objects to the allowance of Claim No. 62 filed by Luedeka, Neely & Graham, P.C. on April 23, 2002, in the amount of \$167,117.16, of which \$23,500.00 is claimed as secured, the Objection is SUSTAINED. Claim No. 62 is disallowed as secured in its entirety both as to the secured and unsecured balance, the claim being duplicative of Claim No. 24.

B. To the extent the Trustee objects to the allowance of Claim No. 44 filed by Luedeka, Neely & Graham, P.C. on November 20, 2001, as a nonpriority unsecured

claim in the amount of \$167,117.16, the Objection is SUSTAINED. Claim No. 44 is disallowed in its entirety as a duplicate of Claim No. 24.

C. To the extent the Trustee objects to the allowance of Claim No. 24 filed by Luedeka, Neely & Graham, P.C. on January 23, 2001, as a nonpriority unsecured claim in the amount of \$167,117.16, the Objection is OVERRULED. Claim No. 24 is allowed in its entirety.

SO ORDERED.

ENTER: August 25, 2004

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE