ORIGINAL IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
ENTERED
MAY 21 2002
TAWANA C. MARSHALL, CLERK
By _____
Deputy

IN RE:	§	
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SALVATORE DEFRANK,	§	CASE NO. 99-30852-SAF-7
	§	
D E B T O R.	§	

MEMORANDUM OPINION AND ORDER

George M. McDonald filed a proof of a secured claim in the amount of $8,054.52 against the bankruptcy estate of Salvatore DeFrank, the debtor. Robert Milbank, Jr., the Chapter 7 trustee of the DeFrank bankruptcy estate, objected to the allowance of a secured claim, contending that McDonald's claim should be allowed as a general unsecured claim. The court conducted a hearing on the allowance of the claim on April 22, 2002.

The determination of a claim against the bankruptcy estate constitutes a core matter of which this court has jurisdiction to enter a final order. 28 U.S.C. §§ 157(b)(2)(B) and 1334. This memorandum opinion contains the court's findings of fact and conclusions of law. Bankruptcy Rules 7052 and 9014.

Sections 501 and 502 of the Bankruptcy Code and Bankruptcy Rule 3001 provide that "a party correctly filing a proof of claim is deemed to have established a prima facie case against the

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debtor's assets." In re Fidelity Holding Co., Ltd., 837 F.2d 696, 698 (5th Cir. 1988). The claimant will prevail unless a party who objects to the proof of claim produces evidence to rebut the claim. Id. Upon production of this rebuttal evidence, the burden shifts to the claimant to prove its claim by a preponderance of the evidence. Id. Accordingly, McDonald's proof of claim as a secured claim is prima facie valid, unless the trustee produces evidence to rebut the presumption.

McDonald, an attorney, performed legal services for DeFrank pre-petition. McDonald asserts a secured claim for the resulting unpaid legal services. In his objection, the trustee established that McDonald did not include with the proof of claim either a security agreement or other evidence of a perfected lien. This lack of evidence rebuts the prima facie validity of the proof of secured claim requiring McDonald to establish the claim by a preponderance of the evidence.

At the hearing, McDonald presented an employment agreement that had been entered into between DeFrank and McDonald. Under its terms, McDonald agreed to pursue a cause of action for DeFrank, while DeFrank agreed to pay McDonald an hourly fee. DeFrank also agreed to provide McDonald with a retainer. The employment agreement provides: "[DeFrank] hereby gives and grants unto said Attorney a lien on said cause of action or legal matter, any proceeds in any judgment thereunder to the extent of

the share and sums herein-abovementioned as Attorney's fees and costs."

The court determines McDonald's claim based on applicable state law. Barnhill v. Johnson, 503 U.S. 393, 398 (1992); Butner v. United States, 440 U.S. 48, 54 (1979) (Noting "Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law").

"Under Texas law, an attorney's lien for fees is valid only (a) if the person over whom the lien is asserted is the attorney's client, and (b) the attorney has collected and possesses a judgment or settlement on the client's behalf." Hinton v. Federal Nat'l Mortg. Ass'n, 957 F.Supp. 101, 102 (S.D. Tex. 1997), citing Finkelstein v. Roberts, 220 S.W. 401, 405 (Tex. Civ. App.--Fort Worth 1920, writ dism'd). In Finkelstein, the Texas court observed that Texas does not recognize an attorney lien for fees "on a cause of action or judgment or money until collected and in his hands." 220 S.W. at 405. Therefore, to enforce his lien, McDonald must have collected money and have that money "in his possession." Casey v. March, 30 Tex. 180, 185 (1867).

DeFrank filed his petition for relief, originally under Chapter 13, on February 1, 1999. The parties agree that, as of February 1, 1999, McDonald had not collected money on the claim. In fact, he had no monies in his possession on which to assert a

lien. Consequently, under Texas law, McDonald did not hold a secured claim for unpaid attorney's fees on the petition date.

A claim against a bankruptcy estate is determined as of the petition date. See In re Phones for All, Inc., 249 B.R. 426, 428-29 (Bankr. N.D. Tex. 2000), aff'd, 2002 U.S. App. LEXIS 8549 (5th Cir. Tex. 2002). On the petition date, McDonald did not hold a secured claim cognizable under Texas law. Therefore, DeFrank's cause of action, pursued by McDonald, became property of DeFrank's bankruptcy estate. 11 U.S.C. § 541. The parties agree that the trustee recovered proceeds from DeFrank's cause of action post-petition. The proceeds thus constitute property of the bankruptcy estate. McDonald cannot perfect a lien against those proceeds post-petition. 11 U.S.C. § 362(a)(4). McDonald has not established the applicability of any exception to that prohibition. Based on the foregoing, McDonald does not hold a secured claim against the bankruptcy estate.

Milbank does not dispute that McDonald performed legal services for DeFrank pre-petition. McDonald claims unpaid fees of $8,054.52. Milbank does not dispute that amount. Moreover, Milbank does not object to the allowance of a general unsecured claim for McDonald in the amount of $8,054.52.

McDonald argues that his pre-petition work enabled Milbank to recover the proceeds of DeFrank's claim. Milbank does not contest that position. Nevertheless, pre-petition services that

enhance the value of property that becomes property of the estate cannot elevate an unsecured pre-petition claim to a secured position. On the petition date, under Texas law, McDonald did not have a lien, let alone a lien superior to the trustee. McDonald has not established that Texas would either recognize or permit an equitable lien, when Texas courts have explicitly held that the attorney may not have a lien for fees until he is in possession of proceeds recovered from a judgment or settlement. See United States v. Grubert, 191 F.Supp. 326, 328 n.2 and n.3 (S.D. Tex. 1961) (applying Texas law). McDonald misplaces reliance on the court's decision in In re Niland, 50 B.R. 468, 480 (Bankr. N.D. Tex. 1985). Niland addressed the issue of an equitable lien for a purchaser of property, not for attorney's fees. The court finally notes that McDonald's citations to In re Willis, 143 B.R. 428 (Bankr. E.D. Tex. 1992), and Tarrant County Hospital Dist. v. Jones, 664 S.W.2d 191 (Tex. App.--Ft. Worth 1984, no writ), do not support his position. Those cases addressed contingency fee contracts and, in Willis, the common fund doctrine, neither of which applies here. This court, therefore, does not opine on the Willis analysis. Finally, the court notes that the trustee did not retain McDonald post-petition to pursue collection. Post-petition retention by the trustee would have resulted in a different analysis. Cf. Phones, 2002 U.S. App. LEXIS at 3.

Accordingly,

IT IS ORDERED that the secured claim of George M. McDonald is **DISALLOWED**.

IT IS FURTHER ORDERED that George M. McDonald is **ALLOWED** a general unsecured claim of $8,054.52.

Signed this 17th day of May, 2002.

Judge Steven A. Felsenthal
United States Bankruptcy Judge