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signed 2-3-99

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF KANSAS**

**In Re:**

**D. RICHARD WHITE,**

**DEBTOR.**

**CASE NO. 97-42097-7  
CHAPTER 7**

**BRUCE DUTY,**

**PLAINTIFF,**

**v.**

**ADV. NO. 97-7118**

**D. RICHARD WHITE,**

**DEFENDANT.**

**ORDER GRANTING SUMMARY JUDGMENT ON DISCHARGEABILITY  
QUESTION, BUT DIRECTING PARTIES TO CONFER ABOUT AMOUNT OWED**

This proceeding is before the Court on the plaintiff's motion for summary judgment. The plaintiff is represented by Keith Kocher of Shaw, Hergenreter, Quarnstrom & Kocher, LLP, of Topeka, Kansas. The defendant-debtor, an attorney, appears pro se. The parties have submitted briefs and the motion is ready to be decided.

**FACTS**

The debtor contends that there are some factual disputes, but the Court can resolve the dischargeability issue involved here based on facts he has not contested. While the debtor was actively

practicing law, he represented the plaintiff in a personal injury action arising out of an automobile accident. Their contract called for the debtor to be paid a contingent fee of one-third of any amount recovered for the plaintiff. Apparently, as is typical for such contracts, it made the plaintiff responsible for litigation expenses; the contract has not been submitted, however, so the Court cannot say that this was definitely so or what kinds of expenses would have been covered by the provision.

In 1995, the plaintiff agreed to a so-called “structured settlement” with the insurance company for one potentially-liable party that called for him to be paid \$37,000 immediately, \$7,500 in 1998, \$5,000 in 2003, \$5,000 in 2008, \$10,000 in 2013, and \$34,000 in 2018, for a grand total of \$98,500. The insurance company paid about \$21,000 for an annuity that would fund the future payments under the settlement. The plaintiff will be 55 years old when the last payment comes due. The plaintiff also agreed to accept an immediate payment of \$9,000 to settle with the insurance company for another potentially-liable party. The debtor calculated his contingent fee to be \$35,833, one-third of the \$107,500 total that the plaintiff would eventually be paid.

Following the settlements, the debtor received the \$37,000 and \$9,000 insurance company payments and placed the money in his trust account. A total of \$15,507.56 in subrogation reimbursement was due from the plaintiff’s recovery, and pursuant to Kansas law and his fee agreement with the plaintiff, the debtor retained one-third of this amount, \$5,169.18, as his fee and paid the balance to the insurers entitled to subrogation. The debtor also paid \$2,560.04 directly to medical providers on the plaintiff’s behalf. After these payments, a balance of \$27,932.40 remained in the debtor’s trust account, and he retained it all. The plaintiff received none of the \$46,000 paid initially, but was to retain all of the future payments.

The debtor filed for bankruptcy on July 30, 1997. On November 3, the plaintiff filed this adversary proceeding, seeking a judgment for the difference between the amount the debtor received as his fee and one-third of the value of the settlements at the time the fee was received, alleged to be about \$67,000. The plaintiff also alleged this judgment would be nondischargeable under 11 U.S.C.A. §523(a)(2)(A), (a)(4), and (a)(6). In his answer, the debtor admitted some and denied some of the plaintiff's allegations and asserted "any and all applicable affirmative defenses," but did not allege any specific affirmative defense or make any counterclaim. He has never amended his answer. Several pretrial conferences were held and the plaintiff prepared a proposed pretrial order, but the debtor never supplied any written proposals that he believed should be included in a final pretrial order. At the last pretrial, it was determined that the plaintiff should file a motion for summary judgment.

The plaintiff then submitted such a motion, referring to proposed factual stipulations included in his proposed pretrial order. The debtor responded by complaining about the form of the plaintiff's motion and asserting that only intentional fraud creates a debt that is nondischargeable in bankruptcy. On December 14, 1998, the Court sent a letter to the debtor informing him that, in the Court's view, the plaintiff had properly relied on the stipulated facts included in the proposed pretrial order, and giving the debtor a deadline for controverting any of those facts that he disputed. On December 31, the debtor responded, disputing only proposed stipulations asserting that: (1) he had advised the plaintiff that his fee was to be one-third of \$107,500; and (2) he had demanded and received a fee of \$33,101.58. Apparently to controvert these proposals, he alleged certain facts that he may believe should be considered to reduce the amount he received as his fee for handling the plaintiff's case. He also asserted, as he had orally at the pretrial conferences, that he had been involved in only one

structured settlement before the plaintiff's, that he had calculated his fee in the same manner in that case, and that his calculation had been approved by a state court judge because the settlement involved a minor child. Any error in calculating his fee, the debtor claims, was unintentional.

## DISCUSSION AND CONCLUSIONS

The Court believes the debtor's potential liability to the plaintiff and the dischargeability of that liability can be determined most simply under the Kansas Model Rules of Professional Conduct ("MRPC"), 1997 Kan. Ct. R. Annot. 262-390, and 11 U.S.C.A. §523(a)(4). In general, Kansas law considers an attorney to be a fiduciary for his client, owing him the highest degree of fidelity and good faith. *See, e.g., Phillips v. Carson*, 240 Kan. 462, 478 (1987). More importantly for this case, Rule 1.15 of the MRPC provides in pertinent part:

(a) A lawyer shall hold property of clients . . . that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state of Kansas. . . . Complete records of such account funds . . . shall be kept by the lawyer. . . .

(b) Upon receiving funds . . . in which a client . . . has an interest, a lawyer shall promptly notify the client . . . . Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client . . . any funds . . . that the client . . . is entitled to receive and, upon request by the client . . . , shall promptly render a full accounting regarding such property.

. . . .

(d) Preserving identity of funds and property of a client.

(1) All funds of clients paid to a lawyer or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable accounts maintained in the State of Kansas with a federal or state chartered or licensed financial institution and insured by an agency of the federal or state government, and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(i) Funds reasonably sufficient to pay bank charges may be deposited therein.

(ii) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(2) The lawyer shall:

. . . .

(iii) Maintain complete records of all funds . . . of a client coming into the possession of the lawyer and render appropriate accountings to the client regarding them.

(iv) Promptly pay or deliver to the client as requested by a client the funds . . . in the possession of the lawyer which the client is entitled to receive.

*1997 Kan. Ct. R. Annot. 316-17.* The Comment to this rule declares: “A lawyer should hold property of others with the care required of a professional fiduciary. . . . All property which is the property of clients . . . should be kept separate from the lawyer’s business and personal property and, if monies, in one or more trust accounts.” *Id. at 319.* As required by this rule, the debtor placed the money he received from the plaintiff’s settlements into a trust account. The money was trust property, and Rule 1.15 clearly made the debtor a fiduciary holding the money in trust for his client.

In pertinent part, §523(a)(4) of the Bankruptcy Code excepts from discharge any debt “for fraud or defalcation while acting in a fiduciary capacity.” Like most courts that have faced the question, the Tenth Circuit has held that a general fiduciary relationship based merely on an attorney-client relationship is not sufficient to satisfy the fiduciary capacity requirement of this provision. *Fowler Bros. v. Young (In re Young)*, 91 F.3d 1367, 1372 (10th Cir. 1996); *see also, e.g., Braud v. Stokes (In re Stokes)*, 142 B.R. 908, 909-10 (Bankr. N.D. Cal. 1992). The required fiduciary relationship must exist before the performance of the action claimed to make a liability nondischargeable, *Allen v. Romero (In re Romero)*, 535 F.2d 618, 621 (10th Cir. 1976), and must arise from an express or

technical trust. *Fowler Bros. v. Young*, 91 F.3d at 1371-72; *Kayes v. Klippel (In re Klippel)*, 183 B.R. 252, 259 (Bankr. D. Kan. 1995).

Facts that the debtor has conceded in this case clearly demonstrate that he calculated his one-third contingent fee improperly. In effect, the debtor claims to have been unaware of the concept of “present value,” which simply recognizes the fact that the receipt of \$1 today is worth slightly more than the receipt of \$1 tomorrow or the next day, and significantly more than the receipt of \$1 more than twenty years in the future. Although his client was to be paid \$46,000 at once and \$61,500 in varying increments over time in the future, the debtor calculated his fee to be the same as it would have been if all \$107,500 had been paid immediately. In fact, however, the future payments were funded by the purchase of an annuity for about \$21,000, not \$61,500, so at the time of that purchase, the future payments were worth no more than the cost of the annuity. The debtor’s fee should have been based on the present value of the settlements, \$46,000 plus about \$21,000, or about \$67,000; one-third of this sum is \$22,333.33, but the allowable fee would be even less when expenses are taken into account. Thus, not only did the debtor hold the settlement money in trust for his client, he also miscalculated his fee and collected more than he was entitled to. This much is definitely resolved under the facts the debtor has admitted. The only remaining question is whether his alleged lack of evil motive could prevent his actions from constituting a “defalcation” under §523(a)(4).

In a decision that this Court is bound to follow, the Tenth Circuit Bankruptcy Appellate Panel has resolved that question. *Antlers Roof-Truss & Builders Supply v. Storie (In re Storie)*, 216 B.R. 283, 286-90 (10th Cir. BAP 1997). The court said, “We conclude that ‘defalcation’ under section 523(a)(4) is a fiduciary-debtor’s failure to account for funds that have been entrusted to it due to any

breach of fiduciary duty, whether intentional, wilful, reckless, or negligent. Furthermore, the fiduciary-debtor is charged with knowledge of the law and its duties.” *Id.* at 288. Consequently, to the extent that the debtor took more than one-third of the present value of the plaintiff’s settlements as his fee, he committed a “defalcation while acting in a fiduciary capacity” that is covered by §523(a)(4).

In certain portions of his December 31 response, the debtor seems to have intended to indicate that some of the \$33,101.58 he retained from the initial settlement payments should not be considered to be part of the fee he charged the plaintiff. These assertions prevent the Court from being able to determine the proper amount of the plaintiff’s claim against him. The parties should easily be able to determine the present value of the settlements (at the time they became effective) by adding the \$46,000 to the actual amount paid for the annuity purchased to cover the future payments. The Court notes that MRPC 1.5(d) provides in pertinent part: “A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, and the litigation and other expenses to be deducted from the recovery. All such expenses shall be deducted before the contingent fee is calculated.” 1997 *Kan. Ct. R. Annot.* 290. If there were expenses properly chargeable under the fee agreement, they should have been deducted before the debtor’s fee was calculated.

The plaintiff is entitled to a nondischargeable judgment to the extent the debtor’s fee exceeded his proper share, as described above, of the settlements. The parties should confer to see whether they can agree what the amount of that judgment should be. If they cannot agree, they should determine whether any evidence must be presented to enable the Court to determine the amount. In any event, they should inform the Court no later than Monday, March 8, 1999, of the results of their discussions.

IT IS SO ORDERED.

Dated at Topeka, Kansas, this \_\_\_\_\_ day of February, 1999.

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JAMES A. PUSATERI  
CHIEF BANKRUPTCY JUDGE