



SO ORDERED.

SIGNED this 28th day of September, 2017.

Dale L. Somers

Dale L. Somers
United States Bankruptcy Judge

**For online use but not print publication
IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In re:

**REX VEECH YOUNGQUIST,

DEBTOR.**

**CASE NO. 11-10135
CHAPTER 7**

**ORDER DENYING IN PART AND GRANTING IN PART
MOTION TO SATISFY ALLEGED ATTORNEYS' LIEN OF FLEESON,
GOOING, COULSON & KITCH, L.L.C. FROM
PROPOSED DISTRIBUTION TO THE STATE OF TEXAS**

The matter before the Court is "Notice of Attorneys' Lien of Fleeson, Gooing, Coulson & Kitch, L.L.C. and Motion to Satisfy Lien from Proposed Distribution to the State of Texas."¹ The Railroad Commission of Texas² responded that an attorney's lien

¹ Doc. 505.

² Although the caption of the Texas state court order appointing Peter E. Pratt as receiver to collect the judgment in favor of the State of Texas states that the plaintiff is the State of Texas, it is the Railroad Commission of the State of Texas that has filed an amended proof of claim to

did not attach to the proposed distribution and opposes the motion.³ Argument was heard on August 10, 2017. Fleeson, Gooing, Coulson & Kitch, L.L.C. (Fleeson) appeared by Thomas J. Lasater. The Railroad Commission of Texas (the Commission) appeared by local counsel, Rachael Longhofer, Office of the Kansas Attorney General, and telephonically by J. Casey Roy, Texas Assistant Attorney General. Michael J. Morris, the Chapter 7 Trustee, appeared by Michael J Morris.

BACKGROUND FACTS.

On February 18, 2010, the State of Texas obtained a judgment in the amount of \$632,830.99 against Debtor Rex Veech Youngquist (Youngquist) and others in the District Court of Travis County, Texas, case no. D-1-GV-08-001748. By order dated March 23, 2010, the Texas State Court appointed Peter E. Pratt, Jr. (Pratt) as “receiver . . . vested with the fullest authority under Texas law to seize all non-exempt property of the defendants . . . and to pay the proceeds to Plaintiff to the extent required to satisfy the judgment.”⁴ Pratt, through counsel, registered the judgment in the District Court of

collect the balance of the judgment and is awaiting a distribution from the Trustee. The distinction, if any, between the State of Texas and the Texas Railroad Commission has not been raised by any of the parties and is deemed irrelevant.

³ Docs. 508 & 513.

⁴ Doc. 513-3, 1. The appointment appears to have been under the authority of Tex. (Civil Practice & Remedies) §31.002 (2010), the turnover statute, which is “a procedural devise to assist judgment creditors in post-judgment collection.” *Davis v. West*, 317 S.W.3d 301, 309 (Tex. App. 2009).

Douglas County, Kansas, the county in which its debtor Youngquist resided and owned substantial real property. Collection efforts were undertaken.

On January 25, 2011, Youngquist filed a voluntary petition for bankruptcy. Pratt retained Thomas J. Lasater (Lasater) of Fleeson to represent him in the Youngquist bankruptcy. Pratt agreed to pay Fleeson an hourly fee for services rendered. There was no written fee agreement.

Three separate secured proofs of claim were filed with respect to Youngquist's liability on the Texas judgment: Claim 4 filed by creditor Peter E. Pratt, prepared by the Kansas counsel who registered the Texas judgment in Kansas; claim 10 filed by creditor Peter E. Pratt, prepared by Thomas J. Lasater; and claim 12 filed by creditor the Commission, in care of the Attorney General of Texas, signed by the director of the enforcement division of the Railroad Commission of Texas.

Pratt was removed as receiver by order filed in the District Court of Travis County, Texas on September 14, 2016.⁵ At that time, Pratt owed an outstanding balance of \$4,338.92 to Fleeson for services rendered for the period of April 1, 2015 through July

⁵ Doc. 513-2, 1. The order states that "Peter E. Pratt collected \$842,744.64 in judgment debtor funds during the pendency of the receivership in this case. Of this amount Plaintiff, the State of Texas, received, \$528,520.50." *Id.* It was further ordered that "Peter E. Pratt Jr. immediately pay the balance [after payment of expenses, including the Fleeson fees] of the collected funds retained by the receivership, in the amount of \$237,941.15, to Plaintiff, the State of Texas." *Id.*, at 3. The Texas Railroad Commission's proof of claim, to which there was no objection, does not show a credit of \$237,941.15. POC 12-2, exh 1. The total credit shown is \$473,233.11, less than the amount said to have been paid to the state. *Id.*

12, 2016.⁶ The order of dismissal directed Pratt to “immediately pay \$4,338.92 from collected funds [otherwise payable to the State of Texas] to the firm of Fleeson [sic], Gooing, Coulson & Kitch, L.L.C.”⁷ Fleeson has not received payment from Peter Pratt and is unable to locate him.

After the termination of the receivership, Michael J. Morris, the Chapter 7 Trustee, gave notice pursuant to D. Kan. Bankr. Rule 3001.1(d) to entities that had filed proofs of secured claims that he did not intend to object to secured claims and “any creditor who had not filed with the Clerk of the United State Bankruptcy Court an amendments [sic] to their secured claim setting forth the amount of their unsecured balance, if any, will not be included and provided for any distribution unless said amendment setting forth their unsecured claim, if any, has been filed on or before March 9, 2017.”⁸ Of the three secured claims filed with respect to the Texas judgment against Debtor, only proof of claim 12, filed by creditor the Commission, was amended. The Commission’s original secured claim of \$649,172.35 was reduced to an unsecured claim of \$188,776.56.

Although the amended claim states that David Cooney, Director of Enforcement of the Railroad Commission of Texas, completed and signed the amended proof of claim, at oral

⁶ Doc. 505-1, 8. The Court surmises that significant attorneys fees have been paid to Fleeson by Peter Pratt, receiver. The record shows that Thomas J. Lasater, of Fleeson, Gooing, Coulson & Ketch, L.L.C., entered an appearance in the main case on May 5, 2011. Thomas Lasater represented Peter Pratt in adversary case no. 11-5079. That case was resolved by an agreed journal entry and the case was effectively closed on January 25, 2013.

⁷ Doc. 513-2, 1.

⁸ Docs. 483-489.

argument the Court was informed that Lasater of Fleeson assisted with the preparation. Lasater's time sheets, attached to the Motion, show that after the termination of Pratt as receiver, Lasater devoted .40 hours to review of documents regarding distribution of proceeds of sale of assets and 2.4 hours to preparation of an amended proof of claim.⁹ The charge for these services is \$700.

On June 7, 2017, the Chapter 7 Trustee filed his Trustee's Final Report, proposing a disbursement to the Commission of \$21,620.03.¹⁰ On July 10, 2017, Fleeson filed its notice of attorneys' lien in the amount of \$5,038.92 and motion for satisfaction of the lien from the proposed distribution to the Commission. It was served by certified mail on the Commission and by hand delivery to the Chapter 7 Trustee. The Chapter 7 Trustee has not responded.

FLEESON DOES NOT HAVE AN ATTORNEYS' LIEN FOR FEES IN THE AMOUNT OF \$4,338.92 IN THE PROPERTY HELD BY THE TRUSTEE FOR DISTRIBUTION TO THE COMMISSION.

Fleeson asserts that it has an attorneys' lien in the amount of \$5,038.92 under K.S.A. 7-108 in the \$21,620.03 that the Trustee proposes to distribute to the Commission. The amount of the lien is the sum of \$4,338.92, the amount owed to Fleeson when Pratt was removed, plus \$700.00 in fees for work performed after the removal. The Kansas attorney lien statute provides in part:

⁹ Doc. 505-1, 9 &10.

¹⁰ Doc. 496.

An attorney has a lien for a general balance of compensation upon any papers of his or her client which have come into the attorney's possession . . . , upon money in the attorney's hands belonging to the client, and upon money due the client and in the hands of the adverse party, in any matter, action or proceeding in which the attorney was employed, from the time of giving notice of the lien to the party.¹¹

The Commission responds that Pratt, not the Commission, was Fleeson's client, so no attorneys' lien attached to the funds held by the Trustee.¹²

The Court finds that Fleeson does not have an attorneys' lien in the funds held by the Trustee for distribution to the Commission for payment of the \$4,338.92 in fees owed when the receivership was terminated. The Kansas attorneys' lien statute is clear and unambiguous - the lien attaches to property due the attorney's client in a matter in which the attorney was employed. Fleeson's client was Pratt, as receiver. Pratt does not have any interest in the funds held by the Trustee for distribution to the Commission.

Therefore the Court denies Fleeson's assertion that the funds held by the Trustee for distribution to the Commission are subject to Fleeson's attorneys' lien in the amount of \$4,338.92.

¹¹ K.S.A. 7-108.

¹² Doc. 508. It further argues that Pratt, a court appointed receiver, was not an agent of the Commission or any other party, such as the State of Texas. It cites *Zayas*, 347 B.R. 446, 449 (Bankr. M.D. Fla. 2006), for the proposition that in Texas, a court appointed receiver is an officer of the court and not an agent of either party involved in the case. In its reply brief filed in response to the Commission's brief in opposition, Fleeson questions the applicability of the *Zayas* ruling to this case. Doc. 511, 5 n. 3. It also asserts that "[i]t is not necessary for the Court to analyze whether Pratt, as court-appointed receiver, was acting as an agent of Texas in collecting its judgment," (doc. 511, at 5, n.1) and shifts its reliance to equitable considerations, discussed below. *Id.* The Court therefore does not decide the agency question.

FLEESON DOES NOT HAVE AN EQUITABLE CLAIM TO \$4,338.92 OF THE FUNDS TO BE DISTRIBUTED TO THE COMMISSION.

As an alternative to its reliance on the Kansas attorney lien statute, Fleeson contends it is entitled to payment from the funds to be distributed to the Commission under an equitable exception to the rule that an attorney's claim for compensation may be allowed only against a client.¹³ The Commission argues that the exception does not apply in this case.

Fleeson relies on a Kansas case where there was a dispute between a plaintiff's attorney and the plaintiff's insurer as to whether the attorney was entitled to a fee on the insurer's subrogated portion of a settlement.¹⁴ The court concluded that "an attorney under appropriate circumstances may be allowed a fee from a portion of a fund recovered through his efforts based upon equitable considerations."¹⁵ This is a recognized application of the common fund doctrine.¹⁶ That doctrine "permits a party who creates, preserves, or increases the value of a fund in which others have an interest to be

¹³ In its reply brief, Fleeson contends it is entitled to payment from the funds to be distributed to the Railroad Commission under a Kansas exception to the general rule that an attorney's claim for compensation can only be asserted against one with whom the attorney has a contract of employment. Doc. 511. Because the Texas Railroad Commission, with leave of Court, responded to this new position, consideration of this exception will not be barred by the general rule that new matters cannot be raised in a movant's reply brief. Doc. 513.

¹⁴ *Quesenbury v. Wichita Coca Cola Bottling Co. Inc.*, 229 Kan. 501, 625 P.2d 1129 (1981).

¹⁵ *Id.*, 229 Kan. at 504, 625 P.2d at 1132.

¹⁶ 7 Am. Jur. 2d Attorneys at Law § 230 (2017).

reimbursed from that fund for litigation expenses incurred, including attorney fees.”¹⁷ It is an exception to the general rule that an attorney shall be compensated only by his or her client and allows “an attorney under appropriate circumstances . . . a fee from a portion of a fund recovered through his efforts based upon equitable considerations.”¹⁸ The attorney seeking the fees has the burden of proof,¹⁹ and “[b]ecause the allowance of attorney’s fees out of a common fund is subject to abuse, it may only be permitted in exceptional cases when required to promote justice.”²⁰

The Court finds that the common fund doctrine does not provide a basis to award fees to Fleeson from the distribution to the Commission. The distribution is in payment of the Commission’s unsecured claim. Fleeson did not recover or otherwise create the pool of funds available to unsecured creditors. Fleeson’s representation of Pratt during the period that the \$4,338.92 in fees was incurred was directed toward the sale of property in the Kansas state court proceedings, not recovery of the unsecured claim. In addition, the order of dismissal directed Pratt to pay Fleeson \$4,338.92 from funds which would otherwise be transferred to the Commission. Although Pratt apparently did not follow the

¹⁷ *Robinson v. City of Wichita Employees’ Retirement Bd. of Trustees*, 291 Kan. 266, 287, 241 P.3d 15, 29 (2010).

¹⁸ *Quesenbury*, 229 Kan. at 504, 625 P.2d at 1132.

¹⁹ *Id.*

²⁰ 7 Am. Jur. 2d Attorneys at Law § 229 (2017).

Texas court order, it would not be equitable to order the Commission to make the payment because Pratt failed to do so.

FLEESON HAS A \$700 LIEN FOR SERVICES RENDERED AFTER THE TERMINATION OF THE RECEIVERSHIP IN THE FUNDS TO BE DISTRIBUTED TO THE COMMISSION.

The Court finds that Fleeson is entitled to payment of \$700 from the funds held by the Trustee for distribution to the Commission. After the termination of the receivership, Fleeson continued to provide legal services. The Fleeson time sheets show that these services were directed to the amendment of a proof of claim. Proof of claim 14, filed by the Commission, was amended, but proofs of claim 4 and 10 filed by Pratt were not amended. The Court finds that the legal services provided by Lasater after September 14, 2016, were for the benefit of the Commission.

An attorney client relationship sufficient to support the award of fees may be implied, as well as express.²¹ “Unless the circumstances show that services were intended to be gratuitous, a party’s acceptance of, or acquiescence in, the services rendered by an attorney will raise an implied promise to pay for the services.”²² Under the circumstances of this case, there was an implied attorney client relationship between Fleeson and the Commission after September 14, 2016. The Commission is therefore liable to Fleeson for the value of those services.

²¹ 7 Am. Jur. 2d Attorneys at Law § 226 (2017).

²² *Id.*

The question is whether Fleeson has a lien for its services under the Kansas attorney's lien statute. Other courts have found that an attorneys' lien attaches to recovery on a creditor's claim in bankruptcy. The Second Circuit has held that under New York law "[a]n attorney representing a creditor in a bankruptcy proceeding has a judicially enforceable . . . lien upon the fund allocated to the payment of his client's claim."²³ Under Colorado law, the attorneys' lien statute has been construed to grant an attorney a lien in funds to be distributed to creditors for services in obtaining a state court judgment and in representing the judgment creditors in the judgment debtors' subsequent bankruptcy.²⁴ Likewise, under Missouri law, a creditor's claim for collection of a prebankruptcy judgment was held to be subject to the lien of the counsel who procured the judgment.²⁵

Kansas attorneys' lien statute provides that the lien attaches to "money due to the client in the hands of the adverse party, in any matter, action or proceeding in which the attorney was employed, from the time of giving notice of the lien to the party."²⁶ The lien is "based on the natural equity that the plaintiff should not be allowed to appropriate the whole of a judgment in his favor without paying thereout for the services of his attorney in

²³ *Gordon v. Shirley Duke Assoc., A.P.I. (In re Shirley Duke Assoc.)*, 611 F.2d 15, 18 (2nd Cir. 1979).

²⁴ *In re Campbell*, 26 B.R. 145 (Bankr. D. Colo. 1983).

²⁵ *Hecker v. Blackwell (In re Gault)*, 2014 WL 6796591 (Bankr. E.D. Mo. 2014).

²⁶ K.S.A. 7-108.

obtaining the judgment.”²⁷ In a Chapter 7 bankruptcy proceeding, when a creditor files a secured proof of claim, the Chapter 7 Trustee is in the position of an adverse party. It is the Trustee who may object to the claim, seeking to reduce the claim amount or to avoid liens. Generally, the creditor’s attorney resists the Trustee’s attempt to reduce the claim. The creditor receives the fruits of his or her counsel’s representation when a distribution is made by the Trustee. The Court concludes that with respect creditors seeking allowance of claim a Chapter 7 Trustee may be an adverse party within the meaning of the Kansas Attorney lien statute.

The Court finds, assuming proper notice of the lien, that Fleeson, who was retained by the Commission to prepare its amended proof of claim, has a lien in funds held by the Trustee for distribution to the Commission for fees incurred while representing the Commission. The Trustee has not contended that notice of the lien was insufficient. Fleeson therefor has a \$700 lien in the funds held by the Trustee for distribution to the Commission. The Trustee shall distribute \$700 to Fleeson and the remainder of the funds to the Commission in satisfaction of its unsecured claim.

CONCLUSION

As to the \$4,338.92 in fees owed to Fleeson by Pratt on September 14, 2016, the Court holds that Fleeson’s attorneys’ lien did not attach to the funds held by the Trustee for distribution to the Commission and that there is not an equitable basis to find the

²⁷ *Ahalt v. Greenwood*, 109 Kan. 328, 331, 198 Pac. 970, 971 (1921) (quoting 6 C.J. 766, § 364).

Commission owes the fees to Fleeson. Regarding the services rendered by Fleeson after the removal of Pratt as receiver, the Court holds that the Commission was Fleeson's client and, assuming proper notice, a \$700 lien in favor of Fleeson attached to the funds held by the Trustee for distribution to the Commission.

IT IS SO ORDERED.

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