UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

ADRIANE JOY BASTYR,
Debtor.

BKY 4-88-1868

JULIA CHRISTIANS, as Trustee for the Bankruptcy Estate of Adriane Joy Bastyr,
Plaintiff,
-v.-
LARKIN, HOFFMAN, DALY & LINDGREN, LTD.,
Defendant.

ADV 4-90-15

and

JULIA CHRISTIANS, as Trustee for the Bankruptcy Estate of Adriane Joy Bastyr,
Plaintiff,
-v.-
BELL, ARCAND, FLORIN & TENNANT,
Defendant.

ADV 4-90-16

and

JULIA CHRISTIANS, as Trustee for the Bankruptcy Estate of Adriane Joy Bastyr,
Plaintiff,
-v.-
SCHWARTZ & ASSOCIATES,
Defendant.

ADV 4-90-17

MEMORANDUM ORDER GRANTING PARTIAL SUMMARY JUDGMENT IN ADV 4-90-16

At Minneapolis, Minnesota, July 13, 1990.

The above-entitled matter came on for hearing before the undersigned on the 28th day of June, 1990 on motions by plaintiff Julia Christians (the "Trustee") and defendants Bell, Arcand, Florin & Tennant and Schwartz & Associates for summary judgment. The appearances were as follows: Richard McGee for the Trustee; Michael LeBaron for Larkin, Hoffman, Daly & Lindgren, Ltd. ("Larkin"); Thomas Johnson for Bell, Arcand, Florin & Tennant ("Bell"); and Frank Farrell, Jr. for Schwartz & Associates ("Schwartz"). This Court has jurisdiction over the parties to and the subject matter of this adversary proceeding pursuant to 28 U.S.C. Sections 157 and 1334, and Local Rule 103. Moreover, this Court may hear and finally adjudicate these motions because their subject matter renders such adjudication a "core" proceeding pursuant to 28 U.S.C. Section 157(b)(2)(K).

UNDISPUTED FACTS

In January of 1983, Adriane Joy Bastyr, then Adriane Joy Kassell (the "Debtor"), retained Bell to commence a medical malpractice and product liability lawsuit to recover for injuries suffered by the Debtor as a result of breast implant surgery she

underwent in 1979. In late August of 1986, the Debtor terminated Bell and retained Schwartz to pursue the litigation. Debtor subsequently retained Larkin as co-counsel.

On September 2, 1986, Bell properly filed a UCC-1 statement in order to perfect an attorneys lien on any recovery resulting from the lawsuit. The retainer agreement Bell prepared and Debtor executed at the time the firm was retained listed Debtor's name as "A. Joy Kassell." Debtor, however, married prior to her termination of Bell, and took her husband's last name, "Bastyr." For reasons not entirely clear, the UCC-1 form Bell filed following its termination listed the Debtor's name as "Joy Kassell Bastyr" rather than as "A. Joy Bastyr" or "Adriane Joy Bastyr," the latter of which was her correct name both at the time Bell filed the financing statement and at the time Debtor filed for bankruptcy.

Schwartz and Larkin negotiated a settlement of the lawsuit. A check dated April 28, 1988 in the amount of $190,000 was deposited in Schwartz's trust account in consideration of Debtor's dismissal of the lawsuit. A state court order entered May 6, 1988 decreed that Bell, Schwartz and Larkin were entitled to receive from the settlement proceeds aggregate legal fees of $63,332.00, of which Bell was entitled to $16,000 and Schwartz and Larkin were each entitled to $23,666.00. On May 9, 1988, Schwartz filed on behalf of the Debtor a voluntary petition for relief under Chapter 7 of the Bankruptcy Code. Schwartz subsequently made disbursements from its trust account to Bell, Larkin and itself in accordance with the terms of the state court order, and paid the balance of the $190,000 of settlement proceeds to the Debtor.

None of the three firms sought approval from this Court prior to disbursement of the settlement proceeds from Schwartz's trust account. The Trustee commenced the instant adversary proceedings to avoid the postpetition transfers of settlement proceeds to the firms pursuant to 11 U.S.C. Section 549 and to compel turnover of said proceeds. In its answer, Bell asserted sought a declaration that the Trustee is not entitled to avoid its attorney lien pursuant to 11 U.S.C. Section 544(a). The Trustee, Bell and Schwartz have moved for summary judgment on a number of legal issues. This Memorandum Order will address solely Bell's request for declaratory relief, concerning which both Bell and the Trustee have moved for summary judgment.

By uncontroverted affidavit, the Trustee has demonstrated that a search with the Secretary of State's office under the name "Adriane J. Bastyr" and the address listed in her bankruptcy petition will result in no record being located under that name. Yet Bell has demonstrated by uncontroverted affidavit that a search under the name "Adriane Joy Bastyr" and the address listed in her bankruptcy petition will result in the "mention" of a record filed under the name "Joy Kassell Bastyr" at the same address, under which name the creditor could then search to discover Bell's financing statement:

> [I]n this particular instance, the name on file is Joy Kassell Bastyr, 14809 McGinty Road, Wayzata, MN 55391. If an information request were presented where the debtor's last name was Bastyr and the address was in Wayzata, the financing statement would be "mentioned" on the search certificate. The requesting party would then have the opportunity to make a request for information under the name mentioned.

Affidavit of Cheri Smith 11. Moreover, Bell has demonstrated by uncontroverted affidavit that a search under "Adriane Joy Bastyr," "A. Joy Bastyr," "Adriane Joy Kassell" and "A. Joy Kassell", the

names listed in the debtor's bankruptcy petition, will reveal Bell's attorney lien.

DISCUSSION

"Absent a special priority in the conflicting claims on the same collateral, the UCC establishes priority based on the time of filing." Lieberman Music Co. v. Hagen, 394 N.W.2d 837, 840 (Minn. Ct. App. 1986). Such priority is established only if the first-filed document complied with the requirements of Minn. Stat. Section 336.9-402 for a valid financing statement. One such requirement is that the financing statement must provide the name of the debtor. Minn. Stat. Section 336.9-402(1). The financing statement, however, may still be valid even if the debtor was not correctly named in the statement:

> A financing statement . . . substantially complying with the requirements of this section is effective even though it contains minor errors which are not seriously misleading.

Minn. Stat. Section 366.9-402(8) (emphasis added). When determining whether the listing of an incorrect name for the debtor in the financing statement constituted a "minor error" which was "not seriously misleading," a court must ask whether a reasonably diligent creditor searching under the debtor's true name would be likely to discover the financing statement. First Manufactured Housing Credit Corp. v. Clarkson Mobile Home Park, Inc., 148 A.D.2d 901, 539 N.Y.S.2d 529, appeal denied 74 N.Y.2d 611 (1989). See also Lieberman Music Co., 394 N.W.2d at 840.

Initially, Bell contends that the Trustee should be considered to stand in the shoes of a creditor who knew that the Debtor routinely used a number of names other than her true name. See Brushwood v. Citizen's Bank (In re Glasco, Inc.) 642 F.2d 793 (5th Cir. 1981). A creditor with notice that a debtor routinely uses a name other than its true name may be required to search under both names to establish that it was acting as a reasonably diligent creditor when it failed to discover a prior financing statement. See Lieberman Music Co., 394 N.W.2d at 840-41. Consequently, Bell asserts, the Trustee, to be considered reasonably diligent, was required to search under all four names listed by the Debtor in her bankruptcy petition. According to an uncontroverted affidavit, such a search would have revealed Bell's financing statement. Therefore, Bell contends, the Trustee is not be entitled to avoid Bell's attorney lien pursuant to 11 U.S.C. Section 544(a).

I am reluctant to follow the Brushwood court's holding that a bankruptcy trustee stands in the shoes of a creditor with notice that the debtor routinely uses a name other than its true name. In Brushwood, the trustee was denied avoidance of a lien perfected by a financing statement listing the debtor's name as "Elite Boats, Division of Glasco, Inc.," when no copy of the statement was indexed under "Glasco, Inc.," the debtor's true name:

> The majority points to indications that the debtor always did business under the name "Elite Boats, Division of Glasco, Inc." and concludes that therefore any potential creditor would know to check under that non-legal name. But we are reviewing a case that was disposed of on a motion for summary judgment. Given this state of the record there may have existed creditors who would have perceived the debtor as simply "Glasco, Inc." . . .. Surely the trustee could be taken to stand in the shoes of such an ideal creditor who had no notice. And in searching for "Glasco, Inc." one would not normally come across an item filed under the title of "Elite Boats."

Id. at 798 (Tuttle, J., dissenting) (emphasis added).

My difference with the Brushwood court's opinion is more fundamental than the dissent's; a bankruptcy trustee can never be deemed to stand in the shoes of a creditor with notice under section 544(a), since a trustee invoking section 544(a) is not deemed to stand in the shoes of any actual creditor. But c.f. Northern Commercial Corp. v. Friedman (In re Leichter), 471 F.2d 785, 787 (2d Cir. 1972) (per curiam) (trustee under Bankruptcy Act deemed to stand in shoes of most favored creditor rather than creditor with notice). A bankruptcy trustee, assuming the status of a hypothetical creditor under section 544(a), cannot be deemed to have had actual notice that the debtor routinely used a name other than its true name. The issue here is not what search the trustee as a creditor should have performed, but what search a reasonably diligent hypothetical creditor would perform.

I conclude that a hypothetical creditor exercising reasonable diligence would have discovered Bell's financing statement. As demonstrated by uncontroverted affidavit, a creditor who searches under the Debtor's true name and the address listed in her bankruptcy petition would receive sufficient information from the search to discover Bell's financing statement. The additional effort and expense involved in performing a second search under the mentioned name is so minor that a reasonably diligent creditor would undertake such a search. Thus, the instant case is distinguishable from cases in other jurisdictions where courts have denied priority to a creditor who filed a financing statement incorrectly listing the debtor's first names because the statement could not be located without searching all the records having the debtor's last name. See, e.g., Clarkson Mobile Home Park, Inc., 148 A.D.2d 901, 539 N.Y.S.2d 529.

The Trustee does not dispute that a creditor examining the record filed under "Joy Kassell Bastyr" would be put on notice that Bell might have a prior interest in the Debtor's property:

> Under the UCC system of notice filing, the question is whether a search under the debtor's true name would reveal the filing and whether the financing statement, once found, would reveal the correct identity of the debtor.

Lieberman Music Co., 394 N.W.2d at 840. Consequently, I conclude that Bell had properly filed a valid financing statement perfecting its attorney lien prior to the Debtor's filing for bankruptcy. Therefore, based upon the uncontroverted affidavits submitted by the parties, Bell must be granted summary judgment on its request for a declaration that the Trustee is not entitled to avoid its attorney lien pursuant to 11 U.S.C. Section 544(a). Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986).

ACCORDINGLY, IT IS HEREBY ORDERED:

1. The motion of Bell, Arcand, Florin & Tennant for summary judgment in its favor on its request for a declaration that the Trustee is not entitled to avoid its attorney lien is granted;

2. The Trustee's motion for summary judgment in its favor on Bell's request for declaratory relief is denied;

3. Bell, Arcand, Florin & Tennant shall have judgment declaring that the Trustee is not entitled to avoid its attorney lien pursuant to 11 U.S.C. Section 544(a).

LET JUDGMENT BE ENTERED ACCORDINGLY.

Nancy C. Dreher

United States Bankruptcy Judge