UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re	:	Chapter 11
3036 RICHMOND, INC. d/b/a JV DISTRIBUTING PLUS	:	
Debtor	:	Bankruptcy No. 00-19226F

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MEMORANDUM

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By BRUCE FOX, Chief Bankruptcy Judge:

Presently before me are two motions, both seeking "adequate protection of [an] interest in property." One motion was filed by Weir & Partners, LLP; the other motion was filed by Israel Weinstock, Esquire. Both movants assert an interest in the following property: a "Merrill Lynch CMA Account," No. 881-34840. Ex. Weir-20. This account, which consists of a certificate of deposit as well as securities, had a value, as of March 7, 2001, of about $520,437.00. Id.

Both motions were opposed by the chapter 11 debtor, 3036 Richmond, Inc. At the hearing held to consider these motions, the debtor reported that it had agreed with Weir & Partners to an acceptable form of adequate protection. No settlement was reached, however, with Mr. Weinstock; moreover, Mr. Weinstock opposes the terms of the settlement reached by the debtor and Weir & Partners, LLP.

Although the issue before me is narrow and not legally complex, a detailed recitation of the convoluted facts - all of which are found in the documents

provided by the parties at the hearing held, and which are not disputed - is required. Many of these documents are either court rulings or pleadings filed with various courts.

I.

In 1995, plaintiffs John J. Valentino, Claire Valentino, and 3036 Richmond, Inc., d/b/a JV Distributing Plus (hereinafter the "Valentino plaintiffs") and various defendants, including Kent International Associates, Ltd. (hereinafter the "Kent defendants") - which defendants were all represented by Mr. Weinstock - agreed to arbitrate a commercial dispute. Ex. Weir-2 (Valentino v. Weinstock, C.A. No. 97-6380, Order of July 20, 1998, ¶ (h)). As a component of their arbitration agreement, the Kent defendants established an escrow fund, with Mr. Weinstock serving as the escrow agent. Id., ¶ (j). Ultimately, the arbitrator required that the Kent defendants deposit and thus Mr. Weinstock hold in escrow the sum of $600,000.00. Id., ¶ (l). The purpose of this escrow arrangement was to help fund any arbitration award in favor of the Valentino plaintiffs against the Kent defendants. Id., ¶ (l).

For reasons not germane to this bankruptcy dispute (but described in Ex. Weir-2, at ¶¶ (m) - (p)), Mr. Weinstock released the escrow funds to the Kent defendants. The arbitrator then directed that the Kent defendants and Mr. Weinstock restore the escrow. Id., ¶ (r). When that did not occur, the Valentino plaintiffs filed a lawsuit in District Court against Mr. Weinstock and others. Valentino v. Weinstock, C.A. No. 97-6380.

By an order dated July 20, 1998 (entered on July 21, 1998), Mr. Weinstock and the Kent defendants were directed by the District Court "to deposit the $600,000.00 (plus interest) escrow into this Court's Registry, to be maintained pending confirmation of any Arbitration award or other written agreement between the parties." Ex. Weir-2 (Valentino v. Weinstock, C.A. No. 97-6380, Order of July 20, 1998, ¶ (oo)). Again, the purpose of this registry fund was to serve as "security for the payment of any award in favor of plaintiffs in connection with [the] arbitration proceeding;" the funds were to remain in the court registry until further court order. Id., ¶ 4.

On September 8, 1998, the District Court concluded that Mr. Weinstock breached his fiduciary duty as an escrow agent when he released the escrow funds to the Kent defendants. It thereupon entered judgment in favor of the Valentino plaintiffs against Mr. Weinstock. Mr. Weinstock was directed to "deposit by certified check or other bank draft a total of $600,000, plus interest pursuant to 28 U.S.C. § 1961, into the Court's Registry as security for the payment of any award in favor of plaintiffs in connection with [the arbitration] ... to be maintained in an interest-bearing account until further Order of this Court." Ex. Weir-6 (Valentino v. Weinstock, C.A. No. 97-6380, Order of September 8, 1998, ¶ 2).

Mr. Weinstock then filed a notice of appeal from both the July 20th and September 8, 1998 orders. On October 23, 1998, the District Court entered a stay pending appeal of its orders "effective upon defendant Weinstock's posting with the Clerk of a bond or security (in form satisfactory to the plaintiffs) in the amount of

$600,000." Ex. Weir-7 (Valentino v. Weinstock, C.A. No. 97-6380, Order of October 23, 1998, ¶ 2).

To summarize, as of October 23, 1998, there was a $600,000.00 judgment entered against Mr. Weinstock. The Valentino plaintiffs (including the debtor) could not execute upon this judgment because a stay pending appeal was entered. This stay, however, was conditioned upon Mr. Weinstock posting $600,000.00 security with the District Court clerk. Furthermore, it is likely that were any execution permitted, its proceeds would have been placed in some form of escrow, pending the outcome of the underlying arbitration proceedings between the Valentino plaintiffs and the Kent defendants.

On November 13, 1998, Mr. and Mrs. Valentino, the debtor, Weir & Partners, LLP, Walter Weir, Esquire, Mr. Weinstock and Mrs. Weinstock entered into a new escrow agreement intended to provide the "security" acceptable to the plaintiffs, which was specified in the order of October 23, 1998. Ex. Weinstock-1, at 2.

Under the terms of this new contract, Mr. Weinstock agreed to place into escrow $250,000.00 in cash and $350,000.00 in securities. The cash would be invested into a certificate of deposit. The securities would be held in a brokerage account with Merrill Lynch. Id. Weir & Partners, LLP and Mr. Weir were to be the escrow agents. Id, at ¶ 1.

This second escrow agreement provided that the cash and securities were to remain in escrow until the following: If the Third Circuit Court of Appeals affirmed the July and September, 1998 District Court orders, and if Mr. Weinstock did not deposit an additional $600,000.00 into the District Court registry, then the escrow

agents could liquidate the escrow account and deposit the proceeds into the court registry. If the orders against Mr. Weinstock were vacated or if the District Court action against him were dismissed, then the escrow funds were to be paid to Mr. Weinstock. Finally, the escrow account could be terminated upon court order. Id., ¶ 7(a)-(c).

The Valentino plaintiffs and Mr. Weinstock then filed a stipulation with the District Court providing that their November, 1998 escrow agreement was satisfactory security for the October, 1998 order granting a conditional stay pending appeal. The District Court approved this stipulation on January 15, 1999. Ex. Weir-9.

On August 19, 1999, the Third Circuit Court of Appeals affirmed without opinion the order of the District Court entered on July 21, 1998 - which had directed Mr. Weinstock to place $600,000.00 into the District Court Registry. Ex. Weir-10. Despite this affirmance, Mr. Weinstock did not deposit any funds into the court registry, and the Merrill Lynch escrow account was not liquidated.

On December 30, 1999, the arbitrator entered an award in favor of the Valentino plaintiffs and against the Kent defendants in the amount of $1,036,928.23 on one set of claims, and in the amount of $203,479.27 on another set of claims. Ex. Weinstock-5 (Piller v. Valentino, C.A. No. 99-MC-40, January 12, 2000 order, at ¶ (m)[1]). This award of more than $1.2 million was then confirmed by the District

[1]The court order refers to the date of the arbitration award as December 30, 1998. Given the sequence of events outlined and the parties conduct, it is highly unlikely that the Valentino plaintiffs would have waited one year to confirm an arbitration award, or that the Kent defendants would have waited one year to challenge it. Therefore, the 1998 date is likely to be a typographical error.

Court on January 12, 2000. Id. An appeal of the order confirming the arbitration award was then filed and is still pending with the Third Circuit Court of Appeals.

Of course, the original escrow agreement entered in connection with the underlying arbitration proceeding between the Valentino plaintiffs and the Kent defendants ultimately spawned litigation (involving Mr. Weinstock), so it is not surprising that the second escrow agreement entered into by, inter alia, Weir & Partners, LLP, the debtor, and Mr. Weinstock should also result in additional litigation.

On February 2, 2000 - less than one month after the arbitration award was confirmed - the Valentino plaintiffs filed a motion with the District Court in civil action 97-6380 (the lawsuit in which Mr. Weinstock was a defendant), which requested that the court order the escrow funds held by Weir & Partners, LLP released and paid to the plaintiffs. Ex. Weir-1 (docket entry #77). In addition, by February, 2000, a fee dispute had also arisen between the Valentino plaintiffs and their former attorney, Weir & Partners, LLP. Thus, the District Court was also requested by Weir & Partners to assert jurisdiction over this fee issue, refer the matter to a magistrate judge, and to permit the distribution of the escrow funds solely to the Valentino plaintiffs only after counsel's fee had been paid from the escrow proceeds.

On February 15, 2000, Mr. Weinstock filed his own motion for a stay pending appeal of the order confirming an arbitration award, Ex. Weir-1 (docket entry #78), along with a memorandum in opposition to the release of the escrow funds either to the Valentino plaintiffs or their former counsel.

By an order dated May 9, 2000, the District Court resolved these various requests for relief. Ex. Weinstock-6. After reviewing the lengthy history of the parties' litigation, the District Court stated:

> (d) Weir and the Valentinos [including the debtor] now move separately for an order releasing the escrow funds, and Weinstock has moved to retain the escrow account pending the decision of our Court of Appeals;
>
> (e) Our September 8, 1998 Order contemplated that the escrow fund would be maintained pending an arbitral award; thus, as the arbitration concluded some time ago, the fund should be released to the Valentinos (the prevailing parties in the arbitration proceeding), and we will deny Weinstock's motion for a stay; ....

Ex. Weinstock-6, ¶¶ (d)-(e).

Thus, this May 9, 2000 order expressly denied Mr. Weinstock's request for a stay pending appeal of the arbitration confirmation award, and also directed Mr. Weir, the escrow agent, to release the escrow proceeds to the Valentino plaintiffs' new counsel, Gary A. Devito, Esquire. The District Court further declined to assert jurisdiction over the fee dispute. Id., at ¶¶ 1-4. On May 16, 2000, Mr. Weinstock filed a notice of appeal from the May 9th decision. Ex. Weir-1 (docket entry # 92).

Weir & Partners, LLP immediately moved for reconsideration. By an order dated May 17, 2000, the District Court stayed its earlier ruling directing the release of the funds to the Valentino plaintiffs, pending further review. Ex. Weir-12. On July 10, 2000, the District Court modified its May 9th order. It directed Weir & Partners to turn over the escrow funds to the Valentino plaintiffs by August 10, 2000: a date chosen so that former plaintiffs' counsel would have the opportunity - in that 30 day interval - to seek state court injunctive relief against its former clients, which relief

might enjoin them from transferring those escrow proceeds pending a state court resolution of their fee dispute.

On July 21, 2000, Weir & Partners, LLP filed a civil action in the Pennsylvania Court of Common Pleas against the Valentino plaintiffs, including the debtor. It requested, inter alia, that the state court determine that it held a "charging lien" or a "retaining lien" on the escrow funds, requested that the court fix its fee in the amount of $539,513.68 as of May 9, 2000, and requested that the court direct that the $600,000.00 escrow account serve as security for the payment of its fee. Weir Motion, Ex. D.

To summarize again, by July 21, 2000 the following had occurred: The Valentino plaintiffs had received an arbitration award against the Kent defendants in an amount in excess of $1.2 million. That award had been confirmed by the District Court, with the confirmation decision pending on appeal. Mr. Weinstock had been ordered to deposit $600,000.00 in the District Court registry. In lieu thereof, he deposited cash and stock with a value of $600,000.00 into an escrow account, with Weir & Partners, LLP serving as the escrow agent. Mr. Weinstock's challenge to the District Court directive to deposit such funds had been overruled on appeal. The District Court had also ordered that the escrow funds be paid to the Valentino plaintiffs by August 10th. Mr. Weinstock's appeal from that decision was still pending; but his request for a stay pending appeal had been expressly denied. Weir & Partners was seeking a state court injunction to enable it to retain the proceeds of the escrow account pending a resolution of its fee dispute with the Valentino plaintiffs.

The lack of any Bankruptcy Court involvement in all this litigation ended on July 25, 2000, when 3036 Richmond, Inc., one of the Valentino plaintiffs, filed a voluntary petition in bankruptcy under chapter 11. Thereafter, the debtor filed a suggestion of bankruptcy with the state Court of Common Pleas, the District Court and the Third Circuit Court of Appeals.

Based upon this suggestion of bankruptcy, the Court of Appeals entered an order dated November 14, 2000, which stayed the appeal Mr. Weinstock had filed from the District Court order - which earlier order had directed the release of the escrow funds and which also denied his request for a stay of any such release pending a determination of the appeal from the arbitration confirmation. Ex. Weir-14. On November 20, 2000, a stay pending appeal was issued by the Circuit Court in the appeal of the arbitration confirmation. Ex. Weir-15.[2] Thereafter, the funds deposited by Mr. Weinstock remained in the Merrill Lynch account held by Weir & Partners, LLP. Ex. Weir-20.

On January 16, 2001, Weir & Partners filed a motion in District Court against Mr. Weinstock to compel compliance with the terms of the escrow agreement. Ex. Weir-1 (docket entry #113). Apparently, Weir asserted that the value of the securities on deposit had fallen to a level below that required under the second agreement and sought the deposit of additional securities. (I am unaware of any

[2]On November 21, 2000, the District Court - upon a motion by the debtor-directed Weir & Partners to release the escrow funds by December 1, 2000. Ex. Weir-16. However, the District Court effectively vacated that decision the next day, upon learning of the stay pending appeal orders issued by the Third Circuit. Ex. Weir-17.

resolution of that motion, although Mr. Weinstock represented at the hearing on the instant motions that additional securities were sent to the Merrill Lynch account.)

The present adequate protection motions were triggered by an order issued by the Third Circuit Court of Appeals, dated February 9, 2001. This order was entered in the appeal filed by Mr. Weinstock challenging the District Court's directive to release the escrow funds to the Valentino plaintiffs, and stated in full:

> The Court's November 14, 2000 order staying the above-captioned appeal is vacated because this is not a proceeding "against the debtor." See Association of St. Croix Condominium Owners v. St. Croix Hotel Corp., 682 F.2d 446 (3d Cir. 1982). Appellees' motion to reconsider and/or vacate November 20, 2000 order (E-41) and Appellees' petition to dissolve the stay (E-47) are granted. The escrow shall be turned over to Appellees.

Ex. Weir-18 (emphasis added).

The directive of the Third Circuit to turn over the escrow funds to the Valentino plaintiffs triggered the motion of Weir & Partners, LLP in this bankruptcy court for "adequate protection." Mr. Weinstock filed a similar motion. He also filed a motion for reconsideration and modification with the Court of Appeals. This latter motion requested of the Circuit Court that the escrow funds "be held in escrow by counsel for [the chapter 11 debtor] pending the final determination of ... [his appeal from the release order and the appeal of the confirmation of the arbitration award] and approving said escrow as a supersedeas bond or its equivalent ...." "Emergent Motion for Reconsideration and Modification," Wherefore Clause. This motion was denied by the Court of Appeals by an order dated March 7, 2001. Ex. Weir-19.

II.

The legal issues before me are far less complicated than the above factual recitation spawned by the litigation involving two escrow agreements. I have no authority to review any of the decisions entered by the District Court or the Court of Appeals. Accord Teachers Ins. and Annuity Ass'n of America v. Butler, 803 F.2d 61, 66 (2nd Cir. 1986) ("[T]he bankruptcy court should not permit the partnership to relitigate issues already decided by [District] Judge Weinfeld, for to allow the partnership to do so, when it knew of the judgment before it filed for bankruptcy, would result in its slipping arguments through the backdoor that had already been turned away at the frontdoor.... allowing relitigation in the bankruptcy court would subvert the intent of 28 U.S.C. § 1294(1) (1982) which provides that appeals from district court decisions are to be heard by the court of appeals for the circuit that embraces the district"). Nor do I have any power to stay any orders entered in those courts. Instead, my focus is on the obligation of a chapter 11 debtor in possession to provide "adequate protection," pursuant to 11 U.S.C. § 363.

The arbitration award of approximately $1.2 million, which was entered and later confirmed, constitutes property of the estate - at least to the extent that such award was in favor of the debtor corporation. 11 U.S.C. § 541(a); see, e.g., In re O'Dowd, 233 F.3d 197 (3d Cir. 2000); Matter of Wischan, 77 F.3d 875, 877 (5th Cir. 1996). Similarly, the debtor's interest in the escrow funds in the Merrill Lynch account are also property of the estate. See, e.g., In re Yeary, 55 F.3d 504, 508-09 (10th Cir.

1995); Matter of Missionary Baptist Foundation of America, Inc., 792 F.2d 502, 504 (5th Cir. 1986).

The debtor has represented in open court that Mr. and Mrs. Valentino have no objection to the debtor's receipt of the entire escrow funds from the escrow agent, Weir & Partners. If those funds are paid to the debtor, the terms of 11 U.S.C. § 363(b) would prevent the chapter 11 debtor from using those funds without court approval, unless the assets were used in the ordinary course of the debtor's business. See, e.g., In re Lavigne, 114 F.3d 379, 384 (2nd Cir. 1997). This debtor may have ceased operating. If so, section 363(b) would inhibit the debtor's use of the funds. See also In re Brookfield Clothes, Inc., 31 B.R. 978, 986 (S.D.N.Y. 1983); In re R.H. Macy & Co., Inc., 170 B.R. 69, 74 (Bankr. S.D.N.Y. 1994). If the debtor obtains the escrow funds, it may only be able to distribute these proceeds upon court order (e.g., to pay an interim fee award under section 331) or in accordance with the terms of a confirmed chapter 11 plan. See 11 U.S.C. § 1123(a)(5)(B), (b)(4).

Nevertheless, both Weir & Partners and Mr. Weinstock are fearful that the debtor will receive authorization to use the escrow proceeds after turnover, before certain determinations are made. For Weir & Partners, former counsel desires its fee dispute and its status as a lien creditor resolved before any funds are spent. For Mr. Weinstock, he wants the escrow to remain intact until the Third Circuit rules on the challenge to the arbitration award. He argues that if the debtor is permitted to distribute the escrow funds to creditors, and should the Third Circuit later reverse the arbitration award, then he will hold a general and possibly uncollectable claim against the bankruptcy estate. Conversely, if the escrow funds are not turned over to the

debtor, and if the arbitration award is vacated, Mr. Weinstock believes that he would be entitled to a recovery of all of the funds held in escrow.

Clearly, the debtor has the present right to receive those funds from the escrow agent (if not the present authority to distribute them). The District Court has so ordered, and its order is no longer stayed pending appeal. Further, the Third Circuit has also directed payment to the Valentino defendants. Nonetheless, section 363(e) provides, in relevant part:

> Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest.

(emphasis added).

Section 363(e) is applicable in chapter 11 cases because the Bankruptcy Code expressly so provides. 11 U.S.C. § 103(a). Although there is no bankruptcy trustee in this case, the chapter 11 debtor in possession has all the powers and limitations of a trustee by virtue of section 1107(a). Accord, e.g., In re Cybergenics Corp., 226 F.3d 237, 243 (3d Cir. 2000) ("When no trustee is appointed, the Bankruptcy Code gives a debtor in possession the powers and duties of a trustee"). Among those powers is the ability to use estate property, subject to providing adequate protection for those with an interest in that property under section 363(e). See, e.g., In re Ionosphere Clubs, Inc., 177 B.R. 198, 206 (Bankr. S.D.N.Y. 1995); In re Village Craftsman, Inc., 160 B.R. 740, 747 (Bankr. D.N.J. 1993); In re Bramham, 38 B.R. 459 (Bankr. D.Nev. 1984).

Thus, before this chapter 11 debtor in possession may use the escrow funds, it must "adequately protect" the "interests" of other parties in those funds.[3] See generally In re Fluge, 57 B.R. 451, 457 (Bankr. D.N.D. 1985):

> The rents derived in consequence of the 1985 lease with Price do, by virtue of FmHA's security interest in rents and its enforcement of that interest, constitute cash collateral and may be used by the estate only if FmHA is afforded adequate protection for its interest consistent with section 363(e). Accordingly, and for the reasons stated it is Ordered that the 1985 rent proceeds now in escrow remain in a cash collateral account until FmHA is afforded adequate protection for their use by the estate ....

The provision of adequate protection may take a variety of forms, 11 U.S.C. § 361, and the type required is dependent upon the nature of the interest to be protected, the value of the collateral, and the circumstances surrounding the bankruptcy case.

Here, the debtor and Weir & Partners have jointly proposed a form of adequate protection. They propose that the entire escrow account be liquidated and paid to the debtor. The debtor in turn agrees to segregate $513,513.68 and deposit that sum in an interest bearing account pending resolution of the fee dispute between the parties. Further, it is understood that Weir & Partners asserts a lien on those funds, which lien has the same validity, if any, as existed when those funds were in escrow.

Of course, this proposal leaves the debtor free to use the undeposited balance of the escrow proceeds - consistent with the limitations imposed by the

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[3]This result would not differ had the debtor sought turnover of the escrow funds under 11 U.S.C. § 542, or 543. A party with an interest in those funds would be entitled to adequate protection before any turnover. See, e.g., U.S. v. Whiting Pools, Inc., 462 U.S. 198, 211-12 (1983).

Bankruptcy Code. Further, the fee dispute may be resolved before the Third Circuit (or the Supreme Court) finally resolves the challenge to the arbitration confirmation. Thus, Mr. Weinstock objects. He contends that the only adequate protection for his interest is for the escrow account to remain in place until the various appeals are all resolved.

For the following reasons, I must conclude that Mr. Weinstock has no interest in the escrow fund and so is not entitled to adequate protection under section 363. I also conclude that the proposed agreement between the debtor and Weir & Partners should be approved.

III.

The Bankruptcy Code does not define the phrase "interest in property." See, e.g., Folger Adam Security, Inc. v. Dematteis/MacGregor JV, 209 F.3d 252, 257 (3d Cir. 2000) (discussing section 363(f), which uses the phrase "any interest in such property"). As I noted earlier, Weir & Partners asserts a charging or retaining lien against a portion of the escrow funds. Clearly a "lien" - which is defined as a "charge against or interest in property ...," 11 U.S.C. § 101(37) - represents an interest in property entitled to adequate protection under section 363(e). Accord, e.g., U.S. v. Whiting Pools, Inc., 462 U.S. 198, 211-12 (1983) ("When property seized prior to the filing of a petition is drawn into the Chapter 11 reorganization estate, the Service's tax lien is not dissolved; nor is its status as a secured creditor destroyed. The IRS, under § 363(e), remains entitled to adequate protection for its interests"); In re Gore, 182

B.R. 293, 308 (Bankr. N.D.Ala. 1995); In re Davis, 40 B.R. 934, 937 (Bankr. D.S.D. 1984). Accordingly, Weir & Partners, which asserts a lien against the escrow account, holds an interest in that property within the meaning of section 363(e).

Conversely, creditors who hold only an unsecured claim against the debtor do not, by virtue of such a claim, hold an interest in property entitled to adequate protection. See, e.g., In re Babcock & Wilcox, 2000 WL 533492, *4 (E.D.La. 2000); In re Garland Corp., 6 B.R. 456, 462 (1st Cir. BAP 1980); In re Munsey Corp., 10 B.R. 864, 865-66 (Bankr. E.D.Pa. 1981); Miller & Bienenstock, "Adequate Protection in Respect of the Use, Sale or Lease of Property," 1 Bankr. Dev.J. 47, 58 (1984). Such creditors in a chapter 11 case may vote on the proposed plan, but cannot invoke section 363(e) to restrict the debtor's use of estate property. As one commentator has explained in the context of a request for relief from the automatic stay under section 362(d):

> Unsecured creditors have no property interests to protect so that relief from the stay under [section 362](d)(2) is never possible. Their other concerns are usually unimportant against the stay because the bankruptcy will discharge the debts owed to them. Essentially, these creditors' reasons for wanting relief from the stay contradict the fundamental purposes of the bankruptcy. Typically, therefore, they lack "cause" for relief under [section 362](d)(1).

Epstein, et al., Bankruptcy, § 3-25, at 267 (1992).

In general, whether a particular creditor holds an interest in property of the bankruptcy estate is determined by reference to relevant non-bankruptcy law, typically state law. See, e.g., Nobelman v. American Sav. Bank, 508 U.S. 324 (1993); Butner v. United States, 440 U.S. 48, 55 (1979). Therefore, Mr. Weinstock's purported interest in the escrow fund must be established by non-bankruptcy law.

The November, 1998 escrow agreement provides that it is to be construed and enforced "in accordance with the laws of the Commonwealth of Pennsylvania, except as Federal law may otherwise apply." Ex. Weinstock-1, ¶ 15. Accordingly, I shall look to Pennsylvania law in determining whether Mr. Weinstock holds an interest in the escrow funds.[4]

Pennsylvania's Commonwealth Court has explained the legal significance of an escrow agreement in the following terms:

> "Escrow" is defined as [a] legal document (such as a deed), money, stock or other property delivered by the grantor, promisor or obligator *into the hands of a third person, to be held by the latter until the happening of a contingency or performance of a condition, and then by him delivered* to the grantee, promisee or obligee. Black's Law Dictionary 545 (6th ed. 1990) (emphasis added). The condition or contingency upon which the escrow shall be delivered must be expressed by an agreement between the parties termed an escrow agreement.... An ordinary escrow agreement creates a fiduciary relationship between the agent and the transferor. The depositor is usually the buyer who, nevertheless, retains title to the escrowed money until the performance of certain conditions or happenings of specific events (the escrow conditions). Once the escrow conditions occur, delivery of the money in escrow is then made by the escrow agent or depositary to the seller ... If the conditions of escrow do not occur, the escrow depositary would normally return the escrowed money to the depositor/buyer unless the facts of the particular escrow agreement were extraordinary.

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[4]At oral argument, Mr. Weinstock's counsel agreed that Pennsylvania law would be the relevant non-bankruptcy law to consider. Moreover, and without now deciding whether Weir & Partners hold such a lien, I note that Pennsylvania law does recognize that a prepetition debt owed to an attorney may be a secured debt if the attorney's claim is protected by one of the three Pennsylvania common law liens: a retaining lien; a legal charging lien; or an equitable charging lien. See, e.g., Novinger v. E.I. DuPont de Nemours & Co., 809 F.2d 212, 218 (3d Cir.), cert. denied, 481 U.S. 1069 (1987); see also Recht v. Clairton Urban Development Authority, 402 Pa. 599, 608 (1961).

Knoll v. Butler, 675 A.2d 1308, 1311-1312 (Pa.Cmwlth. 1996) (citations omitted).

Thus, "(u)nder the usual escrow agreement, the depositor loses control of the instrument or money placed in escrow, although he still retains legal title thereto until performance of the condition or the happening of the specific event upon which delivery is to be made to the depository." Paul v. Kennedy, 376 Pa. 312, 314 (1954).

In other words,

> [t]he grantor loses control over the property placed into escrow, although he retains legal title thereto until the happening of the condition that triggers the escrow agent's duty to deliver the property to the grantee. Paul v. Kennedy, 376 Pa. 312, 315 ... (1954). Title in the grantee will not be perfected until the occurrence of the condition. Zweifach v. Scranton Lace Co., 156 F.Supp. 384, 393 (M.D.Pa. 1957), citing Baum's Appeal, 113 Pa. 58, 65 ... (1886). Significantly, however, the grantor cannot revoke the transfer into escrow following the occurrence of the condition, even if the escrow agent has not yet delivered the property to the grantee. Baum's Appeal, 113 Pa. at 65.... To summarize, under Pennsylvania law, a grantor retains title to property placed in escrow until occurrence of the condition, at which point title vests with the grantee irrespective of whether delivery by the escrow agent has occurred.

In re Mason, 1999 WL 60145, *2 (Bankr. E.D.Pa. 1999) (citations omitted) (footnote omitted).

Accordingly, until the conditions were met by which the escrow agent was to deliver the funds held to the Valentino plaintiffs, Mr. Weinstock, as the grantor, retained an interest in the escrow account. See In re Dameron, 155 F.3d 718, 723 (4th Cir. 1998). Furthermore, I will assume that any such interest would be entitled to be "adequately protected" under section 363(e).

Here, however, the District Court has expressly held that the event triggering the escrow agent's duty to deliver the escrow property to the Valentino plaintiffs occurred. The order dated May 9, 2000, could not be more clear. The District Court held that the condition precedent to the termination of the escrow agreement was the arbitration award, entered in December, 1999. In addition, the directive to the escrow agent to turn the property over to the grantees was recently reaffirmed by the Third Circuit Court of Appeals. Not only are such orders binding in this dispute, but the language of the escrow agreement itself provided that the escrow funds were to be held pending any further court order. Ex. Weinstock-1, ¶ 7(c).

Therefore, under Pennsylvania law, any interest which Mr. Weinstock held in the escrow fund ended - whether in December, 1999 when the arbitration award was made, or on January 12, 2000 when the award was confirmed, or on May 9, 2000 when the District Court ordered the escrow dissolved - prior to the debtor's bankruptcy filing and certainly prior to the present § 363(e) motion. See generally In re Pettit, 217 F.3d 1072, 1078 (9th Cir. 2000):

> By agreement of the parties, the registry funds at issue in this case were being held by the district court as judgment security in the event the jury ruled against the Pettits at trial. Before trial and entry of the adverse judgment by the district court, the Pettits had a contingent property interest in the registry funds.... The contingency was that the jury would find in their favor. If the jury had indeed found in favor of the Pettits, the registry funds would not have been needed to satisfy an adverse judgment and, in all likelihood, legal and equitable title over the funds would have reverted to the Pettits.
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> Unfortunately for the Pettits, however, this contingency never came to pass. The jury ruled against them. Thus, when judgment was entered in favor of the Trust Funds, the Pettits' contingent interest was extinguished.... Once this

> interest was extinguished, it is clear that under California's definition of "property," as well as under any general theory of ownership, the registry funds no longer belonged to the Pettits.
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> The Pettits and the Trust Funds agreed to leave approximately $523,000 in the court's registry to secure payment to the Trust Funds if they prevailed at trial. The Trust Funds did prevail and, after judgment was entered against the Pettits, the Pettits had none of the rights we associate with legal or equitable ownership: they could not possess the funds, use the funds, sell the funds, loan the funds, give away the funds, encumber the funds, or exclude others from using the funds.... After judgment was entered, the funds rightfully belonged to the Trust Funds as the prevailing party at trial.
>
> Because the Pettits retained no legal or equitable ownership interest over the funds once judgment was entered, the funds never became "property of the estate" and were never subject to the automatic stay under section 362.

(citations omitted). Similarly, as Mr. Weinstock holds no interest in the escrow funds, he is not entitled to receive adequate protection under section 363(e).

IV.

The effect of my ruling implicitly recognizes the decision of both the District Court and the Court of Appeals not to stay the liquidation of the escrow account pending the outcome of the appeal from the arbitration confirmation. The District Court has expressly determined that the funds were to be held in escrow only until the arbitration award was entered and confirmed. Its allowance for the debtor to use the liquidated proceeds of the escrow account is functionally no different than if the debtor had executed upon its judgment against Mr. Weinstock, collected $600,000.00,

used the funds, and then saw that judgment overturned on appeal. Mr. Weinstock would then hold an unsecured claim against the bankruptcy estate in an amount equal to that collected from him in execution. See Ogle v. Baker, 137 Pa. 378, 20 A. 998 (1891); O'Donnell v. Fisher. 4 Pa. D. 145, 1894 WL 4210 (Pa.Com.Pl. 1894).

If Mr. Weinstock believes this potential outcome to be unfair, his remedy lies not in the Bankruptcy Code but in federal non-bankruptcy law. Federal Rule of Civil Procedure 62(d) permits him to obtain a stay pending appeal upon posting of a supersedeas bond. It is up to the District Court to decide in the first instance if the bond offered is sufficient. It is clear to me, however, that the District Court (and the Court of Appeals) did not view an escrow account in the amount of about $600,000.00 as the equivalent of a supersedeas bond needed to secure an arbitration award in excess of $1.2 million. Cf. Pa.R.App.P. 1731 (an automatic stay pending appeal is provided upon the posting of "appropriate security in the amount of 120% of the amount found due by the lower court").

Accordingly, I shall deny Mr. Weinstock's motion and approve the debtor's agreement with Weir & Partners, LLP. An appropriate order shall be entered.

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re	:	Chapter 11
3036 RICHMOND, INC. d/b/a JV DISTRIBUTING PLUS	:	
Debtor	:	Bankruptcy No. 00-19226F

.....

ORDER

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AND NOW, this 13th day of March, 2001, for the reasons stated in the accompanying memorandum, it is hereby ordered that the motion of Israel Weinstock, Esquire, seeking adequate protection for his interest in Merrill Lynch CMA Account No. 881-34840 is denied. By a separate order, the agreement between the debtor and Weir & Partners, LLP shall be approved.

BRUCE FOX
Chief Bankruptcy Judge

IN RE:
3036 RICHMOND, INC. d/b/a
JV DISTRIBUTING PLUS

Chapter 11
Bankruptcy No. 00-19226F

Copies of the Bankruptcy Judge's Memorandum and Order dated

March 13, 2001, were mailed on said date to the following:

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