UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re	:	Chapter 11
LAKE ARIEL ASSOCIATES, LTD.;	:	Bankruptcy No. 00-11484F
PLYMOUTH HOUSE HEALTH CARE CENTER, INC.;	:	Bankruptcy No. 00-11485F
MILL HILL ASSOCIATES, LIMITED PARTNERSHIP;	:	Bankruptcy No. 00-11486F
KENT ASSOCIATES, LTD.;		Bankruptcy No. 00-11487F
BROOMALL ASSOCIATES;	:	Bankruptcy No. 00-11488F
MORRIS MANOR ASSOCIATES;		Bankruptcy No. 00-11489F
CHATEAU ASSOCIATES;	:	Bankruptcy No. 00-11490F
WINTHROP HOUSE ASSOCIATES LIMITED PARTNERSHIP	:	Bankruptcy No. 00-11491F
Debtors	:	(Jointly Administered)

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MEMORANDUM

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By BRUCE FOX, Chief Bankruptcy Judge:

There are eight related chapter 11 bankruptcy cases jointly administered under the caption Lake Ariel Associates, Ltd. Seven of these debtors own nursing homes which are leased to subsidiaries or affiliates of Integrated Health Services, Inc. These lessees operate the homes. The eighth debtor - Plymouth House Health Care Center, Inc. - is a corporation which owns certain personal property used in the nursing home owned by Morris Manor Associates.

SouthTrust Bank, N.A., a secured creditor of all eight debtors, has filed the instant pleading styled "Motion to Reconsider Order Approving Employment of Counsel and Motion to Disgorge Retainer." At the time this pleading was filed, an order had been entered which approved the debtors' application to employ the law firm

of Cozen & O'Connor to represent these eight debtors in their chapter 11 reorganization cases. The application for employment disclosed that Cozen & O'Connor had been paid a pre-bankruptcy retainer of $120,000.00 in connection with its intended bankruptcy representation of these debtors.

Although styled as a motion for reconsideration, SouthTrust "does not object to the employment of Cozen & O'Connor...." Motion, at 1. Instead, and what underlies this dispute, "SouthTrust does object to the use of its cash collateral, including the retainer previously paid to C&O, to pay the fees and expenses incurred by C&O in this case." Motion, at 1. The relief sought by SouthTrust was for Cozen & O'Connor to "disgorge" the retainer and repay those funds to the various bankruptcy estates of these eight debtors.[1] Motion, at 12.

After this motion was filed, Cozen & O'Connor withdrew as counsel to these debtors and the debtors were authorized to employ Hangley Aronchick Segal & Pudlin, P.C. as replacement bankruptcy counsel. It has been stipulated by the parties that upon its withdrawal as counsel Cozen & O'Connor withheld $20,000.00 of the prepetition retainer and forwarded the remaining $100,000.00 to Hangley Aronchick Segal & Pudlin.

Presently, SouthTrust does not object to the debtors' retention of replacement counsel. This creditor does, however, continue to oppose the use of the retainer to pay the fees and expenses of any of the debtors' bankruptcy attorneys, and still requests that the now bifurcated retainer be repaid to the debtors.

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[1]Each of the eight debtors contributed $15,000.00 as part of the overall retainer.

In requesting this relief, SouthTrust does not suggest that the debtors violated non-bankruptcy law in tendering the pre-bankruptcy retainer to counsel. Compare Indian Motocycle Associates III Ltd. Partnership v. Massachusetts Housing Finance Agency, 66 F.3d 1246 (1st Cir. 1995) (payment of prepetition retainer violated a regulatory agreement). Instead, SouthTrust contends that the sources of the retainer were rents paid to the debtors by their respective lessees. Further, SouthTrust argues that it held a valid pre-bankruptcy security interest in such rents which, by virtue of 11 U.S.C. § 552(b), survived the debtors' bankruptcy filings. See id., at 1249-50; In re Stearns Bldg., 165 F.3d 28 (Table), 1998 WL 661071, *4 (6th Cir. 1998). The movant also maintains that such rents constitute "cash collateral" within the definition provided by 11 U.S.C. § 363(a). See 1249-50; In re Stearns Bldg.; In re Westwood Plaza Apartments, Ltd., 154 B.R. 916 (Bankr. E.D.Tex. 1993). The use of SouthTrust's cash collateral by the debtors to pay bankruptcy counsel fees would, it is alleged, violate the provisions of 11 U.S.C. § 363(c)(2).[2] Therefore, SouthTrust reasons, the retainer must be returned to the debtors' bankruptcy estates. See, e.g., In re 1560 Wilson Boulevard L.P., 206 B.R. 819, 825 (Bankr. E.D.Va. 1996); In re Westwood Plaza Apartments, Ltd., 154 B.R. at 923 n.11.

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[2]Section 362(c) provides:

> (2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless--
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> (A) each entity that has an interest in such cash collateral consents; or
>
> (B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

The debtors do not suggest in response that the retainer paid to counsel is no longer property of the estate. Compare Indian Motocycle Associates III Ltd. Partnership v. Massachusetts Housing Finance Agency, 66 F.3d at 1255 (retainer was earned prepetition and therefore was not property of the debtor's bankruptcy estate). That is, they apparently concede that the retainer falls into the category of a security retainer, thus affording the debtors a continued interest in the property.[3] See In re 1560 Wilson Boulevard L.P., 206 B.R. at 822 n.6 (retainers in bankruptcy cases are generally considered as security retainers). The debtors counter SouthTrust's position, however, with the argument that the sources of the funds used to pay the retainer were not rents subject to SouthTrust's security agreement. Accordingly, the debtors maintain that the retainer is not cash collateral and there is no violation of section 363(c)(2). See In re 1560 Wilson Boulevard L.P., 206 B.R. 812, 818 (Bankr. E.D.Va. 1996).[4]

[3]Retainers are classified into three categories: those to ensure counsel's availability to represent the client, whether or not such legal services prove necessary ("classic retainer"); those which constitute prepayment for all future services to be performed ("flat fee retainer"); and those which secure payment of anticipated legal services to be performed ("security retainer"). See Indian Motocycle Associates, III Ltd. Partnership, 66 F.3d at 1254-55. Only with the security retainer does the client possess a continuing property interest in tendered funds. Id., at 1255.

[4]Alternatively, the debtors contend that any security interest held by SouthTrust in the retainer is secondary to the interests of counsel. See In re D'Anna, 177 B.R. 819 (Bankr. E.D.Pa 1995).

I.

At the outset of the hearing, I asked the parties whether their dispute was presently justiciable. In so doing, I did not mean to imply that the relief sought was unimportant[5] or even outside the scope of bankruptcy court jurisdiction. I questioned, though, whether this motion was premature in that the debtors had not yet sought to use the retainer post-bankruptcy.

The "case-or-controversy" requirement emanating both from Article III of the Constitution as well as from prudential concerns, including such juridical notions such as ripeness, standing, and mootness, has helped define the limited role of federal courts in our democratic society. Allen v. Wright, 468 U.S. 737, 750-51 (1984). Perhaps because of the prudential concerns, courts have assumed that the same limits of judicial power on Article III courts apply to bankruptcy courts, which are Article I courts. See, e.g., In re Weaver, 632 F.2d 461, 462 n.6 (5th Cir. 1980) (standing requirement applies in bankruptcy disputes); Fred Reuping Leather Co. v. Fort Greene Nat. Bank of Brooklyn, 102 F.2d 372 (3d Cir. 1939) (standing); In re Family Health Services, Inc., 130 B.R. 314 (9th Cir. BAP 1991) (advisory opinions are prohibited); In re Verrazano Holding Corp., 86 B.R. 755 (Bankr. E.D.N.Y. 1988) (case or controversy); Matter of Transport Clearings-Midwest, Inc., 41 B.R. 528, 539 (Bankr. W.D.Mo. 1984) (case or controversy); In re Burckardt, 8 B.R. 327 (Bankr. D.P.R. 1980) (case or controversy).

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[5]For a discussion of potential significance of a dispute over the disgorgement of a prepetition retainer see Mersel and Bressi, "Lethal Weapon-Recovering Prepetition Retainers from Debtor's Counsel," 21 Cal.Bankr.J. 239 (1993).

In addition to prudential concerns, since bankruptcy jurisdiction resides in the district court (an Article III court, see 28 U.S.C. § 1334) which then refers cases and proceedings to the bankruptcy court, 28 U.S.C. § 157, any limits on court power to decide disputes applicable to district courts must also transferred to bankruptcy courts, as the referral agent of the district court. In re Kilen, 129 B.R. 538 (Bankr. N.D. Ill. 1991). Specifically, bankruptcy courts must refrain from rendering any advisory opinions. Accord, e.g., Coffin v. Malvern Fed. Sav. Bank, 90 F.3d 851, 853-54 (3d Cir. 1996); In re Amdura Corp., 121 B.R. 862, 870 (Bankr. D.Colo. 1990) (until former bankruptcy counsel files a fee application, any determination regarding counsel's right to payment from estate property is advisory and so impermissible). Bankruptcy disputes that become moot are no longer justiciable. See, e.g., In re Wiley, 237 B.R. 677, 686 (Bankr. N.D.Ill. 1999); In re Leslie Fay Companies, Inc., 216 B.R. 117, 135-36 (Bankr. S.D.N.Y. 1997). And disputes that are not sufficiently "ripe" cannot be determined. See In re Johnson-Allen, 871 F.2d 421, 423 (3d Cir. 1988), aff'd on other grounds sub nom. Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. 552 (1990); In re Epic Associates V, 62 B.R. 918, 930 (Bankr. E.D.Va. 1986).

The need for a controversy to be ripe in order to be justiciable was explained in these terms:

> The basic rationale underlying the doctrine of ripeness "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements...." Abbott Lab. v. Gardner, 387 U.S. 136, 148 ...(1967). Ripeness is thus "peculiarly a question of timing." Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 580 ... (1985) .... The doctrine turns on whether there are nebulous future events so contingent in nature that

> there is no certainty they will ever occur.... In inquiring whether a particular matter is ripe for examination we look, first, to the fitness of the issue for review and, second, to the hardship to the parties of withholding consideration ... and resolve this two step inquiry pragmatically.

In re Drexel Burnham Lambert Group Inc., 995 F.2d 1138, 1146 (2nd Cir.1993) (citations omitted); accord Coquillette, et al., 15 Moore's Federal Practice 3d, § 101.70 (1999).

Because the issue of ripeness is connected with the power of a federal court to resolve a dispute, it may be raised sua sponte. See Acierno v. Mitchell, 6 F.3d 970, 974 (3d Cir. 1993); Coquillette, et al., 15 Moore's Federal Practice 3d, § 101.73[2] (1999).

II.

At the time these eight debtors transferred funds to Cozen & O'Connor they had not filed any bankruptcy petitions. Thus, the restrictions of section 363(c)(2) concerning the use of cash collateral - which apply only to bankruptcy trustees and, by virtue of section 1107(a) to debtors in possession - were not then applicable. Cf. In re 1560 Wilson Boulevard L.P., 206 B.R. at 823 (the rents became "cash collateral" only on the petition date). After the bankruptcy filings of these debtors, the challenged retainer has remained in the possession of debtors' former and present bankruptcy counsel, neither of whom have the right to use the funds for any purposes at this time. SouthTrust acknowledged at the hearing that there was no risk to recovery of these

funds if bankruptcy counsel remained in possession of the retainer and a later order of disgorgement were entered.

Accordingly, I posed to the parties the question whether it was premature to resolve this dispute until the debtors actually attempted to use these retainer funds to pay their attorneys. Due to the constraint imposed by section 549(a)[6], such use by the debtors could not made until their bankruptcy attorneys sought compensation for services rendered or expenses incurred, and only after compensation was allowed by virtue of sections 330 or 331. See generally In re Busy Beaver Building Centers, Inc., 19 F.3d 833 (3d Cir. 1994).

Once an allowance under section 330 or 331 is made to counsel, and if the debtors seek to pay this administrative expense from the retainer, then the dispute would become justiciable because the debtors would be seeking postpetition to use funds which SouthTrust maintains are cash collateral. See, e.g., In re Woodfield Gardens Associates, 1998 WL 276453 (Bankr. N.D.Ill. 1998) (dispute over disgorgement of prepetition retainer to bankruptcy counsel was considered in the context of an application by counsel for the allowance of interim compensation under

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[6]Section 549(a) provides that "a trustee may avoid a transfer of property of the estate - (1) that occurs after the commencement of the case; and (2) ...(B) that is not authorized under this title or by the court." As one commentator has noted:

> Compensation paid to professionals who have not obtained prior appointment may constitute transfers made without court authority and be subject to avoidance under [section 549(a)] even if secured by a prepetition lien.

L.King, 5 Collier on Bankruptcy, ¶ 549.03[1], at 549-7 (15th ed.rev. 1999) (footnotes omitted). Once an allowance of compensation is made and once a chapter 11 debtor is authorized to pay that allowance, the postpetition transfer of estate property is authorized by the court and payment to counsel is not avoidable.

section 331); In re D'Anna, 177 B.R. 819 (Bankr. E.D.Pa. 1995) (same); In re Westwood Plaza Apartments, Ltd., 154 B.R. at 918 (same); see also In re Stearns Bldg., 165 F.3d 28 (Table), 1998 WL 661071, *2 (issue arose upon motion of the debtor to use cash collateral to pay, inter alia, professional fees); In re 1560 Wilson Boulevard L.P., 206 B.R. at 822 (retainer dispute was decided only after counsel was awarded fees with such award "expressly reserv[ing] ruling on whether the firm could draw down the retainer"); cf. Jesuit High School of New Orleans v. 150 Baronne Street Ltd. Partnership, 1997 WL 749418 (E.D.La. 1997) (until a bankruptcy court authorizes a chapter 11 debtor to use cash collateral, a dispute whether rents are cash collateral is not ripe for appellate review). Contra In re GOCO Realty Fund I, 151 B.R. 241 (Bankr. N.D.Cal. 1993) (deciding whether a prepetition retainer must be disgorged as cash collateral without any request by the debtor to use such funds postpetition).

SouthTrust contends that the parties' disagreement over whether the prepetition retainer constitutes cash collateral is a concrete dispute requiring an interpretation of sections 363 and 552 and thus appropriate for me to determine at this time. The debtors concur that this dispute is presently ripe and justiciable for the added reason that their bankruptcy counsel intends to file for interim compensation "imminently." The debtors see no persuasive reason why I should defer from ruling on the merits of the issue immediately.

Yet the parties' contention overlooks the present posture of these bankruptcy cases.

Pending before me is a motion of SouthTrust to dismiss all eight bankruptcy cases under section 1112(b) as filed in bad faith. See generally In re SGL

Carbon Corp., 200 F.3d 154 (3d Cir. 1999). Were I to grant that motion and dismiss these cases, it would be inappropriate for me to thereafter attempt to resolve this dispute regarding the scope and use of cash collateral. Accord In re Quaker Distributors, Inc., 207 B.R. 82, 83 (E.D.Pa. 1997) (after dismissal, "the priority interests of the parties in the retainer is a matter that must be left to a state court for determination"); see In re Mark Enterprises, Inc., 142 B.R. 17, 20 n.6 (Bankr. D.R.I. 1992) (creditor's motion to prohibit the debtor's use of cash collateral was moot after case was dismissed).

In addition, SouthTrust has stated previously that if the debtors were to dismiss these bankruptcy cases, it would attempt to negotiate a fair resolution of their differences without the need for any bankruptcy reorganization. Perhaps the debtors may be persuaded in the near future to voluntarily dismiss their cases. If so, there would be no need for me to decide this disgorgement motion.

There are other events which could occur in the course of these jointly administered bankruptcy cases which may obviate the need for me to address the issue of disgorgement. The debtors maintain that the value of the nursing homes far exceed the amount owed to SouthTrust. They may propose to sell one or more such homes and repay SouthTrust in full. Were that to occur, the issue of disgorgement would not arise. See also In re Hall Coltree Associates, 146 B.R. 675, 679 (Bankr. E.D.Va. 1992) (question of disgorgement of retainer deferred until the issue of adequate protection is explored more fully). Alternatively, the debtors may propose a reorganization plan (or plans) which is funded from non-cash collateral and which will pay all allowed administrative claims in full. See in re Woodfield Gardens Associates,

1998 WL 276453, *13. Such a plan would not require any determination regarding the use of the debtors' retainer.

For these reasons, I view the issue of disgorgement of the retainer as premature at this time. See also In re Amdura Corp., 121 B.R. at 870. Further, I can see no prejudice to the parties caused by a delay in the resolution of this dispute until the issue is concrete. The retainer funds will remain as they were at the time this case was filed. And the evidentiary record made in connection with the hearing on this motion may be made part of the record of any future dispute on issue of disgorgement.

Therefore, I view the instant motion as non-justiciable. An appropriate order shall be entered.

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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CHATEAU ASSOCIATES;	:	Bankruptcy No. 00-11490F
WINTHROP HOUSE ASSOCIATES LIMITED PARTNERSHIP	:	Bankruptcy No. 00-11491F
Debtors	:	(Jointly Administered)

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ORDER

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AND NOW, this 26th day of April, 2000, for the reasons stated in the accompanying memorandum, it is hereby ordered that the motion of SouthTrust Bank "to Reconsider Order Approving Employment of Counsel and Motion to Disgorge Retainer" is dismissed without prejudice as not presently justiciable.

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BRUCE FOX
Chief Bankruptcy Judge

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CHATEAU ASSOCIATES;	Bankruptcy No. 00-11490F
WINTHROP HOUSE ASSOCIATES LIMITED PARTNERSHIP	Bankruptcy No. 00-11491F (Jointly Administered)

Copies of the Bankruptcy Judge's Memorandum and Order dated April 26, 2000, were mailed on said date to the following:

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