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RECENT DEVELOPMENT

RHOADS V. SOMMER: ATTORNEY'S LIENS ARE IN REM CLAIMS WHICH SURVIVE A CLIENT'S BANKRUPTCY DISCHARGE EVEN IF NO NOTICE IS GIVEN PRIOR TO THE BANKRUPTCY.

By: Terrence Decker

In a matter of first impression, the Court of Appeals of Maryland held that attorney's liens are *in rem* claims which survive a client's bankruptcy discharge despite an absence of notice prior to bankruptcy. *Rhoads v. Sommer*, 401 Md. 131, 931 A.2d 508 (2007). More specifically, the Court held that an attorney's lien pursuant to section 10-501 of the Business Occupations and Professions Article ("section 10-501") is an *in rem* claim which allows for an attorney to pursue debts after bankruptcy has been filed. *Id.* at 131, 931 A.2d at 508.

In September 1993, Standard Federal Savings Association ("SFSA") terminated Lori Rhoads ("Rhoads") from her position as Director of Financial Analysis at SFSA. In January 1994, Rhoads retained Fred S. Sommer ("Sommer") to pursue an employment discrimination lawsuit against her former employers. Sommer filed suit in the United States District Court for the District of Maryland, alleging violations of federal statutes, common law duties, and county human rights laws. The district court granted SFSA's motion for summary judgment on nine of Rhoads' ten claims. A jury found in favor of SFSA on the remaining claim.

In March 1998, Rhoads filed for Chapter 7 bankruptcy, naming Sommer as a creditor holding a \$190,000 legal services claim. Rhoads also disclosed on her financial statement a civil claim for damages of which time for appeal had not expired. The bankruptcy trustee determined that there was no property for distribution from the estate and granted her discharge under 11 U.S.C. § 727 (2000). This determination released to Rhoads any interest she may have had in the civil litigation. Sommer then discussed an appeal of the district court's judgment with Rhoads. In August 1998, after disagreements, Sommer officially withdrew his representation of Rhoads. In September 1998, Sommer sent Rhoads notice of his attorney's lien pursuant to section

10-501 and Maryland Rule 2-652. Also in September 1998, Rhoads filed a *pro se* appeal with the United States Court of Appeals for the Fourth Circuit. The court of appeals reversed the decision of the district court on one issue and remanded the case for a new trial. In December 2002, a federal jury ruled in favor of Rhoads awarding her \$120,006.

In December 2004, Sommer filed a complaint in the Circuit Court for Montgomery County to enforce the remaining \$159,729.74 of the attorney's lien against Rhoads. Rhoads filed a motion to dismiss and Sommer filed a motion for summary judgment. The circuit court granted Rhoads' motion because the plain language of the retainer agreement led the court to conclude that Sommer waived his right to a statutory lien because he did not obtain a judgment or settlement in Rhoads' favor. Sommer appealed and the Court of Special Appeals of Maryland reversed the circuit court, holding instead that the retainer agreement did not waive Sommer's statutory lien. Furthermore, the Court of Special Appeals of Maryland held that the lien was not extinguished in the bankruptcy despite Sommer failing to file a proof of claim in bankruptcy. Rhoads petitioned for a writ of certiorari, which the Court of Appeals of Maryland granted.

After concluding that the plain language of the retainer agreement did not waive Sommer's statutory lien rights, the Court of Appeals of Maryland first considered when the lien was established and what notice was required, if any, to establish the lien. *Rhoads*, 401 Md. at 148-54, 931 A.2d at 518-21. Rhoads argued that any debt owed to Sommer under the retainer agreement was discharged in bankruptcy before any lien was created. *Id.* at 154-55, 931 A.2d at 521-22. Rhoads further contended that section 10-501 grants an attorney the right to assert a lien but requires an attorney to provide formal notice and bring a formal action to enforce the lien. *Rhoads*, 401 Md. at 155, 931 A.2d at 522. The Court disagreed. *Id.* at 155, 931 A.2d at 522.

The Court looked to the plain language of section 10-501 which states "an attorney at law [has] a lien on: (1) a cause of action or proceeding of a client of the attorney at law from the time the cause of action arises or the proceeding begins." *Rhoads*, 401 Md. at 155, 931 A.2d at 522. The Court held that a lien is established at the inception of a cause of action. *Id.* at 155, 931 A.2d at 522. Therefore, the Court determined that the lien took effect when Sommer originally filed the complaint in federal district court on behalf of Rhoads in January of 1994. *Id.* at 156, 931 A.2d at 522-23.

The Court then looked to Maryland Rule 2-652 (“rule 2-652”) to determine whether notice was required, and if so, whether it was given to preserve the lien from discharge by bankruptcy. *Rhoads*, 401 Md. at 156, 931 A.2d at 522-23. Rule 2-652 states that only written notice by certified mail or personal delivery upon the person whom the lien is to be enforced is needed to assert the lien. *Rhoads*, 401 Md. at 156, 931 A.2d at 522. Rule 2-652 merely provides a method of asserting the lien and does not mandate that an attorney give notice to a client prior to a bankruptcy proceeding in order to preserve the lien. *Rhoads*, 401 Md. at 156, 931 A.2d at 522. The Court held that although Sommer gave notice after Rhoads filed for bankruptcy, Sommer's lien existed before Rhoads filed for bankruptcy, and the notice given to Rhoads was sufficient for Sommer to enforce his lien against her. *Id.* at 156, 931 A.2d at 522-23.

The Court next addressed whether the lien was an *in rem* or an *in personam* claim to help establish whether the lien survived the bankruptcy discharge. *Id.* at 156, 931 A.2d at 523. A discharge in bankruptcy releases debtors from personal liability for “pre-petition debts,” but it does not discharge *in rem* claims such as Rhoads’ interest in her pending civil litigation. *Id.* at 157-58, 931 A.2d at 523-24. The Court agreed with the court in *Hoxsey v. Hoffpauir* that “proceedings to enforce such [attorney's] lien[s] are considered as proceedings *in rem* and may be enforced only against the proceeds of a judgment secured in the particular case.” *Rhoads*, 401 Md. at 156-57, 931 A.2d at 523 (quoting *Hoxsey v. Hoffpauir*, 180 F.2d 84, 87 (5th Cir. 1950)). The Court recognized that a section 10-501 lien is an action *in rem* because the claim is against the interest the client holds in a pending judgment or settlement. *Rhoads*, 401 Md. at 157, 931 A.2d at 523.

Rhoads argued that her bankruptcy discharge released her from personal liability. *Id.* at 157-58, 931 A.2d at 523-24. Rhoads further asserted that since she listed Sommer as a creditor holding an *in personam* claim and Sommer was notified of his claim, but failed to file a proof of claim, this debt was discharged through bankruptcy. *Id.* at 159, 931 A.2d at 524. The Court, looking to *Johnson v. Home State Bank*, determined that the discharge of Sommer's *in personam* claim did not affect Sommer's *in rem* claim. *Rhoads*, 401 Md. at 158, 931 A.2d at 523-24 (citing *Johnson v. State Home Bank*, 501 U.S. 78, 84 (1991)).

The Court then determined that because the bankruptcy trustee released the property back to Rhoads, the interest in the civil litigation

became available to creditors. *Rhoads*, 401 Md. at 158, 931 A.2d at 524. The Court noted that, despite the fact that Rhoads filed for bankruptcy and listed her active civil claim for damages on her financial statement, the bankruptcy trustee released any interest in the civil litigation back to Rhoads upon concluding there was no property available for distribution. *Id.* at 138-39, 931 A.2d at 512. The Court further concluded that when the *in rem* claim was abandoned by the bankruptcy trustee, Sommer was not obligated to file any proof of claim for his lien to survive the bankruptcy discharge, even though notice of the lien was not given until after the bankruptcy. *Id.* at 158-59, 931 A.2d at 524. Thus, Sommer was entitled to assert his attorney's lien against Rhoads' judgment, limited to the terms of the parties' retainer agreement. *Id.* at 164, 931 A.2d at 527.

The Court of Appeals of Maryland's holding in *Rhoads* allows attorneys who take all the appropriate steps to place a lien on a client to recover debts owed to the attorney by the client. The Court's decision allows for attorneys in Maryland to recover debts owed to them by their clients despite a bankruptcy discharge of all of the client's personal liability. The Court's plain reading of section 10-501 further safeguards attorneys from being cheated by their clients who file for bankruptcy to escape from paying attorney's fees. The ruling prevents clients from receiving the fruits of their recoveries without paying for lawyers' services by which the recoveries were obtained.