

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| IN RE MAIN, INC., Debtor | : | CIVIL ACTION |
| IN RE ERIC J. BLATSTEIN, Debtor | : | |
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| 718 ARCH STREET ASSOCIATES, LTD., et al. | : | |
| v. | : | |
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| ERIC BLATSTEIN, et al. | : | NO. 98-158 |
| | : | |

MEMORANDUM AND ORDER

YOHAN, J. May , 1999

The debtors in a number of related chapter 7 bankruptcy cases are Eric J. Blatstein (“Blatstein”), and Main, Inc., a corporation which Blatstein formerly controlled. These bankruptcy cases arose from the attempt of one of Blatstein’s creditors to execute on a state court judgment by garnishing the assets of Main, which consisted primarily of the Philly Rock Bar & Grill (“Philly Rock”). After a series of machinations by Blatstein and his insiders, Columbusco, Inc., another corporation controlled by Blatstein, obtained the assets of Main and Main was left with no assets. The details of the transactions culminating in Columbusco’s acquisition of Philly Rock are explained and analyzed in detail in prior opinions by both the bankruptcy court and the district court and need not be repeated here. See 718 Arch St. Assoc. v. Blatstein (In re Blatstein), 226 B.R. 140, 144-47 (E.D. Pa. 1998) (“Blatstein II”); 718 Arch St. Assoc. v. Blatstein (In re Main, Inc.), 213 B.R. 67, 72-770 (Bankr. E.D. Pa. 1997) (“Main II”).

Before the court is the Trustee’s appeal from an order of the bankruptcy court filed on December 12, 1997, which permitted Columbusco to pay its attorneys up to \$1,000 per week for

future services performed on behalf of Columbusco or Philly Rock. The bankruptcy court's order was issued at a time when the bankruptcy court had found that Columbusco acquired the Philly Rock assets through a fraudulent transfer, and thus ordered Columbusco to transfer the restaurant and all its assets to the Trustee. See Main II, 213 B.R. at 83. On November 3, 1997, the district court stayed the actual transfer pending appeal of the bankruptcy court's order, and decreed that Columbusco held Philly Rock in constructive trust for the Trustee. See Record on Appeal ("Record"), No. 8, at 2.

On September 23, 1998, the district court vacated the bankruptcy court's conclusion that Columbusco acquired Philly Rock through a fraudulent transfer, and remanded the issue for further consideration.¹ See Blatstein II, 226 B.R. at 154. The district court also extended the November 3, 1997, stay order until further court order. See In re Blatstein, No. 97-7063 (E.D. Pa. Oct. 5, 1998). The bankruptcy court, on remand, again concluded that Columbusco acquired the Philly Rock through a fraudulent transfer. See 718 Arch St. Assoc. v. Blatstein (In re Main, Inc.), No. 96-19098, 1998 WL 778017, at * 16 (Bankr. E.D. Pa. Nov. 4, 1998). On November 4, 1998, the bankruptcy court then reaffirmed its prior order that Columbusco must transfer Philly Rock's assets to the Trustee. See id. (ordering Columbusco to transfer Philly Rock to the Trustee once the district court's stay order is lifted).² Because the district court's stay order is still in

¹ Portions of the district court's decision in Blatstein II have been appealed to the Court of Appeals for the Third Circuit, but the fraudulent transfer issue was not appealed. See In re Blatstein, appeal docketed, No. 98-1972 (3d Cir. 1998). It thus appears that the bankruptcy court had jurisdiction to consider the fraudulent transfer issue on remand.

² The validity of the bankruptcy court's conclusion that the transfer of Philly Rock from Main to Columbusco was fraudulent is the subject of several other appeals currently before this court which are awaiting briefs.

effect, Columbusco continues to hold the assets of Philly Rock in constructive trust for the Trustee.³

The Trustee's appeal here contends that Columbusco should not be permitted to pay its attorneys \$1000 per week for their current services because Columbusco is using income from the Philly Rock assets held in constructive trust to fund litigation adverse to the Trustee's interests. Such action, the Trustee argues, is a violation of both the district court's November 3, 1997, stay order and a breach of Columbusco's fiduciary duty as a constructive trustee. See Appellant's Brief, at 7-8. Moreover, the Trustee argues, the estate is entitled to recover from Columbusco's counsel all attorney's fees paid by Columbusco from the assets or income of Philly Rock held in constructive trust. See id. at 8-9. Columbusco asserts, in response, that (1) this appeal must be dismissed because the issues on appeal were not raised below; (2) the appeal is barred by the doctrines of issue and claim preclusion; (3) the payments were made in Columbusco's ordinary course of business and were thus permitted by the court; (4) Blatstein did not violate his fiduciary duties because the payments were expressly permitted by the court; and (5) there is no basis on which the Trustee can recover fees from Columbusco's counsel. See Appellee's Brief, at 8-16. After considering the parties' submissions,⁴ I conclude that the bankruptcy court's order allowing Columbusco to pay its attorneys no more than \$1000 per week for future services must be vacated and that the case must be remanded to the bankruptcy court for further factual findings.

³ After all of the aforesaid actions, all of the present and future Blatstein and Main appeals were reassigned to me for disposition.

⁴ On March 23, 1999, the parties filed a transcript of the December 10, 1997, bankruptcy court hearing that completed the record for this appeal.

PRIOR PROCEEDINGS

After the bankruptcy court first ordered Columbusco to transfer the assets of Philly Rock to the Trustee, the district court stayed that transfer on November 3, 1997, providing that Blatstein, Columbusco, and several other Blatstein-controlled corporations

shall remain constructive trustees and fiduciaries of the former assets of the estate of Main, Inc. and the assets of Philly Rock, with the duty to protect and preserve all former assets and property of Main, Inc., including all assets of Philly Rock and Columbusco, for the benefit of Mitchell Miller, Esquire, Trustee of Main, Inc.'s estate.

Record, No. 8, ¶ 2 (the “district court stay order”). The district court further specified that Blatstein and Columbusco should make no payments and transfer no property “to or for the benefit of” Blatstein, his corporations, or any of Blatstein’s insiders, and should make no “transfers, expenditure, or agreements, other than in the ordinary course of business and as necessary to operate Philly Rock, without permission of this Court.” *Id.* ¶¶ 3, 7.

On December 4, 1997, the Trustee filed a motion in the bankruptcy court seeking to prevent Columbusco from using Philly Rock funds to pay Columbusco’s attorney’s fees, and seeking to compel Columbusco to produce certain documents relating to Philly Rock’s financial affairs. *See* Record, No. 9. After an expedited hearing on the Trustee’s motion, held on December 10, 1997, the bankruptcy court ordered that Blatstein, Columbusco, and Waterfront Management, Inc., another Blatstein-controlled corporation,

commensurate with their status as fiduciaries and constructive trustees for the business and assets of Philly Rock and Columbusco . . . are, until further order of this Court, restrained and enjoined from utilizing the funds, assets or property of Philly Rock and/or Columbusco to pay attorneys, accountants, or others . . . for past services rendered or expenses incurred in connection with or relating to the above-captioned bankruptcy proceedings, any adversary proceedings in connection with such proceedings, and/or any appeals taken or defended in

connection therewith.

Record, No. 10, ¶ a. The sole exception to this prohibition permitted “Jacoby Donner, P.C. [to] receive compensation of no more than \$1000 weekly on account of future services performed for Philly Rock or Columbusco.”⁵ Id. ¶ b. The bankruptcy court also granted the Trustee’s motion to compel, which is not at issue in this appeal. See id. ¶ c.

STANDARD OF REVIEW

The district court, sitting as an appellate tribunal, applies a clearly erroneous standard to review the bankruptcy court’s factual findings and a de novo standard to review its conclusions of law. See In re Siciliano, 13 F.3d 748, 750 (3d Cir. 1994). Columbusco argues that the issues before the court are questions of fact and thus are subject to clearly erroneous review. See Appellee’s Brief, at 6-8. Contrary to Columbusco’s assertion, the question of whether the bankruptcy court erred when it permitted Columbusco to pay its attorney’s fees using funds it held in constructive trust for the Trustee requires the court to determine whether Columbusco’s actions constituted a breach of fiduciary duty, a question of law. See In re Unisys Corp. Retiree Med. Benefit “ERISA” Litig., 57 F.3d 1255, 1261, n.9 (3d Cir. 1995), cert. denied, 517 U.S. 1103 (1996) (commenting that question of whether a breach of fiduciary duty occurred under particular circumstances is a question of law). The case which Columbusco attempts to distinguish, Fellheimer, Eichen & Braverman, P.C. v. Charter Tech., Inc., 57 F.3d 1215, 1223 (3d Cir. 1995), is inapposite because it explains the proper standard of review for a bankruptcy

⁵ As this quoted language comprises virtually the entirety of the bankruptcy court’s order, there are no findings of fact or conclusions of law for me to review. The court also cited no legal authority supporting its decision and it is thus very difficult for me, sitting as an appellate tribunal, to pass judgment on the correctness of the bankruptcy court’s decision.

court's decision to impose sanctions on the parties' counsel. The bankruptcy court's order challenged here did not purport to impose sanctions on any party. As the issue presented on appeal requires the court to resolve a question of law, my review will be plenary. See Fed. R. Bankr. P. 8013.

DISCUSSION

I. The Issue on Appeal Was Raised in the Bankruptcy Court

As a preliminary matter, Columbusco contends that the appeal must be dismissed because it presents issues on appeal that were not first presented to the bankruptcy court. Specifically, Columbusco claims that the Trustee now argues that payments to Columbusco's counsel violate the district court's November 3, 1997 stay order, but that this issue was not presented to the bankruptcy court. See Appellee's Brief, at 8. In the bankruptcy court, Columbusco claims, the Trustee asserted only that payments to Columbusco's counsel violated the bankruptcy court's September 8, and October 7, 1997 orders. See id. The Trustee, on the other hand, argues that the applicability of the district court's stay order was directly at issue in the bankruptcy court because it was mentioned in, and attached to, his motion in the bankruptcy court, and because the parties argued about its impact at the December 10, 1997 bankruptcy court hearing. See Appellant's Reply Brief, at 6.

Columbusco's argument is based on a statement by the Trustee's counsel at the bankruptcy court's hearing on his motion that "[t]his has nothing to do with what's in another judge's - - this has to do with your order. Your order was not vacated or stayed." Hearing Tr. Dec. 10, 1997, at 6. This statement was made in the context of a discussion about the impact of the district court's stay order on the Trustee's motion to compel the production of documents, not

its impact on the Trustee's attempt to prevent the payment of attorney's fees. See id. at 5-6. Given the fragmentary and confusing nature of the entire discussion between the parties, it is impossible for the court to rely on this single statement as a basis for dismissing the current appeal because the applicability of the district court's stay order was not argued below. See Johnson v. Horn, 150 F.3d 276, 284 (3d Cir. 1998) (finding that issue was "raised sufficiently" in the court below and so was preserved for appeal). Instead, from the record before the court, it appears that the Trustee directly presented the bankruptcy court with the issue of whether the district court's stay order permitted Columbusco to pay its counsel with constructive trust funds. In his motion, the Trustee argued that the payments violated orders of both the bankruptcy court and the district court. See Record, No. 9, at 4 ("Notwithstanding the Orders of this Court and the District Court, and in violation of his fiduciary duties, Mr. Blatstein has made and intends to make distributions out of Columbusco's bank account to pay various professionals for his own expenses related to this litigation!"). Moreover, the district court's stay order was attached to the Trustee's motion. See id., Ex. C. For these reasons, the court will not dismiss the appeal because the issue presented was sufficiently raised in the bankruptcy court.

II. The Appeal is Not Barred by Either Issue or Claim Preclusion

Columbusco next contends that the appeal must be dismissed because the district court has already decided the issue presented and thus, further consideration of the issue is barred by the doctrines of issue and claim preclusion. See Appellee's Brief, at 9-12. Columbusco's argument is based on its assertion that, during a telephone conference with the Honorable John R. Padova in November, 1997, Judge Padova "held that the Stay Order did not prohibit the payments to Columbusco's counsel at issue here." Id. at 9. The Trustee, however, tells a

different story about the parties' telephone conference with Judge Padova; according to the Trustee, Judge Padova

declined to rule on whether these payments were improper. Judge Padova stated that he was unwilling to 'micro-manage' the case, and given the absence of a pending motion before the Court, he directed the Trustee to file a motion with [the bankruptcy court], if the Trustee concluded that the payments violated this Court's Order. The Court, however, indicated to the parties that if they were unsatisfied with the result, they were free to take an appeal from any decision reached by the Bankruptcy Court.

Appellant's Reply Brief, at 8. As there is no record of the parties' telephone conference with Judge Padova, the court has no basis on which to resolve their dispute over the substance of their conversation with him. Columbusco's issue and claim preclusion arguments must fail, for they depend upon the court's adoption of its version of the telephone conference.

III. Columbusco's Use of Constructive Trust Funds to Pay its Attorneys May Have Violated its Fiduciary Duty to the Trustee

Turning to the merits of the Trustee's appeal, the Trustee contends that the bankruptcy court erred when it permitted Columbusco to use the funds it was holding in constructive trust for the Trustee to pay its attorneys for their participation in litigation adverse to the Trustee's interests. See Appellant's Brief, at 7-8. The Trustee argues that the payments violate both Columbusco's fiduciary duty and the district court's stay order. See id. In opposition, Columbusco contends that the payments did not violate its, or Blatstein's, fiduciary duties because the payments were made in the ordinary course of Columbusco's business and because the payments were necessitated by the Trustee's "almost daily requests . . . for documents and information" about the business of Philly Rock.⁶ Appellee's Brief, at 13. The bankruptcy court

⁶ Columbusco also contends that the district court expressly permitted the payments at issue. See Appellee's Brief, at 12. Though Columbusco provides no citation to support this

made no factual findings about whether Columbusco's payments to its attorneys were actually made with constructive trust funds, or whether the attorneys were paid from other funds Columbusco possessed that were unrelated to Philly Rock. The bankruptcy court also made no findings about whether the payments to its attorneys were made in the ordinary course of Columbusco's business or were necessary to operate Philly Rock. Moreover, the bankruptcy court made no specific factual findings about the nature of the legal services for which Columbusco was compensating its attorneys.

As the Trustee correctly contends, it is well-established⁷ that a constructive trustee has a fiduciary duty to the trust beneficiary, here the Trustee, and "cannot use the trust property, nor his relation to it, for his own personal advantage. All the power and influence which the possession of the trust fund gives, must be used for the advantage and profit of the beneficial owners, and not for the personal gain or emolument of the trustee." Appeal of Baker, 13 A. 487, 487 (Pa. 1888); see also Account of The First Nat'l Bank & Trust Co. in Waynesboro, 115 A.2d 167, 171 (Pa. 1955) (emphasizing that trustee is "under a duty to the beneficiaries to administer the trust

assertion, it appears from the context of this statement that Columbusco is again relying on its version of the telephone conference between the parties and Judge Padova. As discussed above, there is no record of this conversation and no way to verify Columbusco's version of disputed events. I cannot, therefore, conclude that the district court expressly granted Columbusco permission to make these payments under ¶ 7(e) of the stay order.

⁷ The court will apply Pennsylvania law to resolve the issues presented here because the parties have relied exclusively on Pennsylvania law in their briefs and thus appear to agree that Pennsylvania law controls. Moreover, it is logical that the duties imposed on a constructive trustee who is acting as a trustee in Pennsylvania and who is holding the assets of a Pennsylvania corporation in constructive trust for Pennsylvania beneficiaries, should be governed by Pennsylvania law. See Blatstein II, 226 B.R. at 150-55 (applying Pennsylvania law to determine whether the underlying transfer of assets from Main to Columbusco was fraudulent such that a constructive trust should be imposed on those assets for the benefit of Main's creditors).

solely in their interests and it could not profit at their expense nor ordinarily, assert any adverse interest in the trust property”); In re Estate of Dotterrer, 579 A.2d 952, 953 (Pa. Super Ct. 1990), appeal denied, 590 A.2d 297 (Pa. 1991) (explaining that trustee owes a duty of loyalty to the trust beneficiaries); Estate of McCredy, 470 A.2d 585, 597 (Pa. Super. Ct. 1983) (noting that “in general, the trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary”) (citing Restatement (Second) of Trusts, § 170(1)). “[T]he primary duty of a trustee is to preserve the trust assets and to ensure the safety of the trust principle.” In re Estate of Campbell, 692 A.2d 1098, 1102 (Pa. Super. Ct. 1997).

The Trustee contends that because Columbusco’s payments to its attorneys are financing litigation adverse to the Trustee, that the payments are contrary to the Trustee’s interests, and thus a breach of Columbusco’s fiduciary duty. See Appellant’s Brief, at 7-8. At the bankruptcy court hearing, Columbusco admitted that a portion of the payments to its counsel would be applied to fees incurred in pursuing appeals against the Trustee. See Hearing Tr. Dec. 10, 1997, at 36. It appears syllogistic that using constructive trust funds to pay counsel for litigating against the trust beneficiary is not in the trust beneficiary’s interest, but obviously it must be said here. To the extent that Columbusco used constructive trust funds to pay its attorneys for litigating against the Trustee, it has breached its fiduciary duty to the Trustee. See First Nat’l Bank, 115 A.2d at 173 (surcharging trustee for attorney’s fees and costs deducted from trust fund to pay trustee’s counsel for litigating ownership of trust property with the trust beneficiaries). Because the bankruptcy court has not made factual findings concerning the source of the funds with which Columbusco paid its counsel, or whether those payments were applied to legal fees incurred in activities that were actually adverse to the Trustee, however, I cannot determine

whether Columbusco actually breached its fiduciary duty to the Trustee.

In its appellate brief, Columbusco also claims that a portion of the payments to its counsel are necessitated by the Trustee's requests for documents concerning Philly Rock's finances and that "[t]he Trustee cannot honestly assert that the payment for the services rendered by counsel for Columbusco in connection with providing it information during the transition period is in breach of Columbusco's alleged fiduciary duties to the Trustee." Appellee's Brief, at 13-14. The Trustee, in all honesty, does make such an assertion; he contends that

a defendant, particularly one who has been found guilty of a fraudulent conveyance, is not allowed to demand that the victim of fraud pay for the defendant's legal costs for compliance with court-ordered document productions, which were required to allow the victim to prevent a continuation of the fraud. . . . Moreover, the only reason any such legal fees have been incurred in connection with the document productions is that the Defendants continually fail to provide the Trustee with full and complete records as required by this Court's November 3, 1997, Order.

Appellant's Reply Brief, at 4.

As a general principle of trust law, a trust must only pay for counsel fees that are incurred to preserve or benefit the fund or to ensure its proper administration. See Estate of Girt, 305 A.2d 372, 377 n.7 (Pa. 1973) (refusing to allow trustee's counsel fees for participation in litigation between competing trust beneficiaries because the litigation did not "protect, defend or advance" the trust's interests); Estate of Vandergrift, 177 A.2d 432, 442 (Pa. 1962) (reimbursing trustee's counsel fees from trust funds because counsel's services benefitted all trust beneficiaries); Estate of Trimble, 140 A.2d 609, 615-16 (Pa. 1958) (allowing counsel fees to income beneficiaries of trust who engaged in litigation necessary to preserve the trust funds); United States Nat'l Bank in Johnstown v. Campbell, 47 A.2d 697, 701 (Pa. 1946) (allowing

reimbursement of attorney's fees from common fund because counsel's actions protected the common fund). The question thus becomes whether Columbusco's payments to its counsel to respond to the Trustee's document requests benefitted or protected the assets held in constructive trust. Though the Trustee argues with considerable force that the payments were only necessary because of Columbusco's dilatory conduct in producing documents which it was under court order to produce in a timely manner, this is a factual question which must be resolved by the bankruptcy court in the first instance. See In re Indian Palms Assoc., Ltd., 61 F.3d 197, 210 n.19 (3d Cir. 1995) (prohibiting district court from engaging in independent factual findings when deciding a bankruptcy appeal); Record, No. 8, ¶ 5 (ordering Columbusco and Blatstein to produce Philly Rock financial information on a daily and a monthly basis). The bankruptcy court is better prepared to determine whether Columbusco's payments to counsel to produce documents for the Trustee benefitted, protected, or increased the funds held in constructive trust.⁸

The bankruptcy court's conclusion that it should permit Columbusco's counsel to receive up to \$1000 per week appears to be based on its belief that because Columbusco was not in bankruptcy, it had no authority to control Columbusco's expenditures. See Hearing Tr. Dec. 10, 1997, at 3, 7, 9-10 ("I don't think [I] ought to start clamping restrictions on a party's ability to -- you know, to get their representation," "I don't see how I can cut them off from getting paid").

⁸ On remand, the bankruptcy court may also wish to consider making factual findings concerning the Trustee's contention that the payments violated the district court's stay order and Columbusco's contention that the district court's stay order permitted the payments because they were made in the ordinary course of Columbusco's business. The resolution of these issues will require a determination of whether the payments at issue were made in the ordinary course of Philly Rock's business as a restaurant and bar, or whether the payments were necessary to operate Philly Rock as a restaurant and bar. See Record, No. 8, ¶ 7 (e) (prohibiting payments other than those "in the ordinary course of business and as necessary to operate Philly Rock").

The bankruptcy court apparently failed to recognize that it had authority to control Columbusco's ability to pay its counsel using constructive trust funds because Columbusco had a fiduciary duty to use those funds solely for the benefit of the Trustee. If, on the other hand, the bankruptcy court finds on remand that Columbusco was using funds other than those it held in constructive trust to pay its attorneys, the bankruptcy court would be correct in concluding that it has no authority to control those payments as a breach of a fiduciary duty.

IV. The Trustee May Be Able To Recover Columbusco's Payments to its Counsel Made Pursuant to the Bankruptcy Court's December 12, 1997 Order

The Trustee contends that Main's estate should be entitled to recover all the payments to Columbusco's counsel because counsel knew they were receiving funds held in constructive trust for the Trustee. See Appellant's Brief, at 9. Whether Columbusco's counsel received such funds is a question for the bankruptcy court on remand. The court has previously disposed of Columbusco's arguments that the payments were expressly permitted by the district court and that it may legitimately use the constructive trust funds to pay its attorneys. See supra, pt. III. Columbusco's remaining argument is that "the Bankruptcy Code does not permit the Trustee to recover funds paid to Jacoby Donner post bankruptcy pursuant to a Court Order, as the funds are being paid in this case." Appellee's Brief, at 15-16 (citing 11 U.S.C. § 549 (a)). The Trustee replies that § 549 does not insulate a constructive trustee's breach of fiduciary duty at the constructive trust beneficiary's expense. See Appellant's Reply Brief, at 6.

In support of his argument that Columbusco's counsel should return the constructive trust funds they received, the Trustee cites Zagrans v. Cohn, 172 A.2d 291, 293 (Pa. 1961). In Zagrans, the court found that trust beneficiaries could recover from third parties who had

knowingly accepted trust funds from a trustee who was using trust funds to purchase property in his own name. See id. at 292. Columbusco attempts to distinguish Zagrans by arguing that it, or Blatstein, unlike the Trustee in Zagrans, did not use the constructive trust funds to pay Blatstein's personal attorney's fees. See Appellee's Brief, at 15. What Columbusco overlooks is that if the bankruptcy court concludes that it used the constructive trust funds to pay its own attorneys for actions which were contrary to the interests of the Trustee, it breached its fiduciary duty to the Trustee by doing so.

It is a well-established principle of trust law that a trust beneficiary may recover trust property transferred to a third party if the transfer was a breach of the trustee's fiduciary duty and the third party had reason to know that the trustee's action was a breach of its duty. See Struble v. New Jersey Brewery Employees' Welfare Trust Fund, 732 F.2d 325, 337 (3d Cir. 1984); Zions First Nat'l Bank v. United Health Club, Inc., 704 F.2d 120, 124 (3d Cir. 1983); In re Estate of Banes, 305 A.2d 723, 727-28 (Pa. 1973); Columbia Cas. Co. v. County of Westmoreland, 74 A.2d 86, 88 (Pa. 1950); Restatement (Second) of Trusts § 288 ("If the trustee in breach of trust transfers trust property to a person who takes with notice of the breach of trust, the transferee does not hold the property free of the trust, although he paid value for the transfer."), § 295 (permitting recovery against either the trustee or the third party) (1959). On remand, the bankruptcy court must therefore determine whether Columbusco's counsel was on notice that Columbusco's actions constituted a breach of its fiduciary duty, in light of the Trustee's counsel warning to that effect at the bankruptcy court hearing. See Hearing Tr. Dec. 10, 1997, at 37. The bankruptcy court must also decide whether Columbusco used the funds held in constructive trust for the Trustee to pay its counsel. See supra, pt. III. If the bankruptcy court concludes that

Columbusco's counsel knew that they were receiving constructive trust funds, in breach of Columbusco's fiduciary duty to the Trustee, § 549 of the Bankruptcy Code would not prevent the Trustee from recovering these payments under principles of trust law. See Burtch v. Hydraquip, Inc. (In re Mushroom Transp. Co.), 227 B.R. 244, 259 (Bankr. E.D. Pa. 1998).

CONCLUSION

As described above, further factual findings by the bankruptcy court are needed in order to determine whether Columbusco breached its fiduciary duty to the Trustee if it used funds that it held in constructive trust to pay its counsel for activities that were arguably not in the Trustee's interests. Further factual findings are also needed to evaluate whether Columbusco's counsel were aware that they were being paid with funds that were held in constructive trust for the Trustee, and whether they are therefore obligated to return those payments to the Trustee.

An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| IN RE MAIN, INC., Debtor | : | CIVIL ACTION |
| IN RE ERIC J. BLATSTEIN, Debtor | : | |
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ORDER

AND NOW, this _____ day of May, 1999, after consideration of the Appellant's Brief, the Appellee's Brief, and the Appellant's reply thereto, IT IS ORDERED that the bankruptcy court's Order filed December 12, 1997, which permitted Appellee Columbusco to pay its counsel up to \$1000 per week, is VACATED and that this case is REMANDED to the bankruptcy court for further factual findings consistent with the attached memorandum.

William H. Yohn, Jr., J.