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IT IS SO ORDERED.

Thomas F. Waldron
Thomas F. Waldron
United States Bankruptcy Judge

Dated: December 28, 2006

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

In re: WILLIAM C. HAKE,
Debtor

Case No. 03-33697
Adv. No. 06-3470

FIDELITY LAND TITLE AGENCY OF
CINCINNATI, INC.,
Plaintiff

Judge Waldron
Chapter 7

v.

SCOTT L. BRAUM
ELIZABETH HAKE,
Defendants

**DECISION GRANTING
(1) MOTION TO REMAND AND (2)
DETERMINING MOTION TO DISMISS
TO BE MOOT, WITHOUT ANY MERIT
DETERMINATION AND WITHOUT
PREJUDICE TO ANY DECISION OF
THE STATE COURT**

DATED AT DAYTON, OHIO this 28th Day of December, 2006:

INTRODUCTION

The court initially notes that the legal principles relevant in this proceeding were previously before this court in Adversary 06-3312, when, after extensive filings and memoranda, the Plaintiff in that proceeding, Royal Land Title Agency, Ltd., recognizing the appropriate application of the Barton Doctrine, dismissed its action against the chapter 7 Trustee and Scott L. Braum (“Braum”), as attorney for the chapter 7 Trustee.¹ In this proceeding, Adversary 06-3470, appropriate application of the Barton Doctrine results in remand to the State Court to resolve the Plaintiff, Fidelity Land Title Agency of Cincinnati, Inc.’s (“Fidelity”) claims against Braum, not as attorney for the Trustee, but as attorney for the non-debtor party, Elizabeth Hake (“E. Hake”) and the Fidelity’s claims against E. Hake. In order to clarify these appropriate, but different, results, including why a state court motion concerning attorney fees and sanctions was removed to this bankruptcy court from the Montgomery County Court of Common Pleas and why this court is remanding this case back to the state court, without any merit determinations of the underlying issues and without any prejudice to any subsequent state court decisions, some background information will be helpful.

BACKGROUND OF THE STATE COURT LITIGATION

Braum was involved in prepetition litigation in a state court action concerning causes of action that generally fall under the heading of real estate fraud. The specific details of the state court proceedings are not necessary for this decision, except to note that when the bankruptcy case of William C. Hake was filed and the chapter 7 trustee succeeded to the debtor William C. Hake’s causes of action, the chapter 7 Trustee determined to pursue these claims and moved to employ Braum as Special Counsel to

¹ See *Order Determining No Issues Remain and Directing Clerk to Close Adversary* (Doc. 46, October 26, 2006, Adv. 06-3312).

the Trustee. As an asset of the chapter 7 bankruptcy estate, the Trustee can pursue any pre-petition cause of action of the Debtor. See generally 11 U.S.C. §§ 541 and 704. Accordingly, Braum was appointed Special Counsel by this bankruptcy court to pursue actions on behalf of the Trustee.

PROCEDURAL HISTORY OF PENDING PROCEEDING

On November 7, 2006, Braum and E. Hake filed a *Notice of Removal of Fidelity Land Title Agency of Cincinnati, Inc.'s Motion for Sanctions and Attorney Fees Relating to Special Counsel Scott L. Braum and Elizabeth Hake in Spaeth, et al. v. Charske, et al., Case No. 2005-CV-1069 in the Common Pleas Court of Montgomery County, Ohio.* (Doc. 1) The *Notice of Removal* was filed pursuant to 28 U.S.C. § 1452(a) and Bankruptcy Rule 9027. On November 15, 2006, Fidelity filed its *Objection to Removal of Fidelity Land Title of Cincinnati, Inc.'s Motion for Sanctions and Attorneys Fees Relating to Attorney Scott L. Braum and Elizabeth Hake in Spaeth, et al. v. Charske, et al., Case No. 2005-CV-1069 in the Court of Common Pleas, Montgomery County, Ohio and Motion to Remand.* (Doc. 7) On November 25, 2006, Braum and E. Hake filed a *Motion of Respondents, Special Counsel, Scott L. Braum and Elizabeth Hake, to Dismiss Fidelity Land Title Agency of Cincinnati, Inc.'s Claims for Sanctions and Attorney Fees, Combined with Notice and Opportunity to Object.* (Doc. 17) On December 4, 2006, Braum and E. Hake filed their *Response* (Doc. 20) to Fidelity's *Objection to Removal* and also the *Motion to Remand*. On December 6, 2006, Fidelity filed its *Reply* (Doc. 21) in support of their *Objections to Removal* and *Motion to Remand*. On December 7, 2006, Fidelity filed a *Memorandum in Opposition* (Doc. 22)

to Braum and E. Hake's *Motion to Dismiss*. On December 14, 2006, Braum and E. Hake filed a *Reply* (Doc. 23) in support of their *Motion to Dismiss*.

It is worthy of note that only William C. Hake filed bankruptcy. Braum added the Debtor's wife, E. Hake, as an additional Plaintiff in the amended complaint and separately represented her in the state court litigation. Since she was never a debtor in the bankruptcy court, her representation by Braum was never a matter for involvement by this bankruptcy court.

One of the Defendants in the state court lawsuit was Fidelity. On October 23, 2006, Fidelity filed a motion in the state court for attorney fees and sanctions against Braum and E. Hake. (See Exhibit A to Doc. 1) Although the particulars of the allegations and the procedural details of the state court litigation prior to the *Motion* (See Exhibit A to Doc. 1) are not significant for this decision, the state court motion alleged, in essence, that Braum, importantly for this decision, as attorney for E. Hake, not as attorney for the chapter 7 Trustee, engaged in frivolous proceedings in the state court proceeding against Fidelity for which Fidelity seeks to a money judgment against Braum and E. Hake.

ANALYSIS

It is settled bankruptcy law that a trustee acting in an official capacity and parties employed by the trustee have certain protections under what is known as the Barton Doctrine. The origin of the Barton Doctrine is an 1881 United States Supreme Court decision, *Barton v. Barbour*, 104 U.S. 126 (1881). The decision holds that an action cannot be brought against a receiver without obtaining leave of court from the tribunal that appointed the receiver. The Barton Doctrine has been extended to apply to

trustees in bankruptcy for acts in their official capacity. *Allard v. Weitzman (In re DeLorean Motor Co.)*, 991 F.2d 1236, 1240 (6th Cir. 1993); *In re Linton*, 136 F.3d 544, 545 (7th Cir. 1998). See also *In re Triple S Restaurants*, 342 B.R. 508 (Bankr. W.D. Ky. 2006). In addition, these principles apply to counsel for a trustee. See *Lowenbraun v. Canary (In re Lowenbraun)*, 453 F.3d 314, 321 (6th Cir. 2006); *Greenblatt v. Richard Potasky Jeweler, Inc. (In re Richard Potasky Jeweler, Inc.)*, 222 B.R. 816, 822 (S.D. Ohio 1998), citing *Allard v. Weitzman (In re DeLorean Motor Co.)*, 991 F.2d 1236, 1241 (6th Cir. 1993).

It is readily apparent that the Barton Doctrine does not protect either Braum in his role as the attorney for E. Hake, or E. Hake from Fidelity's sanctions motion. These parties in their lawyer/client relationship fail to come within the ambit of protection afforded by the Barton Doctrine.

Fidelity has specifically noted in its *Motion to Remand* – “Fidelity’s motion is against non-debtor Elizabeth Hake and her attorney, Braum, who cannot be ‘special counsel’ as to his representation of her as a non-debtor.” (Doc. 7 – page 6). While Braum and E. Hake appear to argue that the actions on behalf of the Trustee and E. Hake are “inextricably linked” [See Page 7, Footnote 6 of Doc. 20], none of the cases cited in the voluminous filings of either party support the Barton Doctrine protecting a stranger to the bankruptcy court or her counsel.

The fact that Braum also represented the Trustee does not extend the Barton Doctrine to his representation of other parties not in a direct relationship to the Trustee, who happen to be part of the same litigation. Braum does not cite to any reported decision for this principle, and the court upon its own independent research is not aware

of any such extension of the Barton Doctrine, nor would this court find any such extension appropriate in the circumstances of this adversary.

Additionally, of importance to a full analysis of the issues presented in this proceeding is a recognition that the merits of Fidelity's *Motion* (See Exhibit A to Doc. 1), and this court specifically expresses no opinion on the merits, would be best determined by the state court. The state court that presided over the litigation would obviously be the most appropriate forum to determine whether fees and sanctions, if any, can be fairly attributed to Braum's separate representation of E. Hake. To the extent such findings by the state court may require a careful parsing of Braum's role as counsel for E. Hake as opposed to his role as Special Counsel for the Trustee, the state court, intimately familiar with the details of the state court proceedings and its own decisions, is in a much better position than this court to make those determinations.

This court does not presume to propose any particular method for the state court to analyze the relief sought in Fidelity's *Motion*. Instead, this court simply holds that the Barton Doctrine protects Braum from being sanctioned in the state court for his actions as the Trustee's Special Counsel; however, no such Barton Doctrine protection extends to Braum as the attorney for E. Hake or to E. Hake in the state court litigation. The court finds it appropriate to remand this proceeding pursuant to 28 U.S.C. § 1452(b).²

The parties devote much discussion to whether the state court sanctions motion (See Exhibit A to Doc. 1) is properly under this court's jurisdiction. The court finds it unnecessary to address this question. This court assumes it has jurisdiction based, at least, on the broad concept of "related to" bankruptcy jurisdiction in 28 U.S.C. § 1334;

² 28 U.S.C. § 1452(b) states, in relevant part, "[t]he court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground."

however, remand is necessary in this instance for the reasons stated. In addition, this court's remand moots any concern of Fidelity that the initial removal was untimely under Bankruptcy Rule 9027.

CONCLUSION

Fidelity's *Motion to Remand* (Doc. 7) is **GRANTED**. The *Motion to Dismiss* (Doc. 17), filed by Braum and E. Hake is **DETERMINED TO BE MOOT, WITHOUT ANY MERIT DETERMINATION AND WITHOUT PREJUDICE TO ANY DECISION OF THE STATE COURT.**

c:

Elizabeth Hake, 5380 Flora Drive, Lewisberg, Ohio 45338 (Plaintiff)

Scott L. Braum, Esq., 3131 South Dixie Drive, Suite 400, Dayton, Ohio 45439 (Atty. for the Plaintiff/Special Counsel for Trustee)

James A. Matre, Esq., 225 Pictoria Drive, Suite 200, Cincinnati, Ohio 45246 (Atty. for the Defendant Fidelity Land Title Agency of Cincinnati, Inc.)

William C. Hake, 5380 Flora Drive, Lewisburg, Ohio 45338 (Debtor)

Donald F. Harker, III, Esq., One First National Plaza, Suite 2103, 130 West Second Street, Dayton, Ohio 45402-1503 (Atty. for the Debtor)

Paul H. Spaeth, Esq., 130 West Second Street, Suite 450, Dayton, Ohio 45402 (Chapter 7 Trustee)

Office of the United States Trustee, 170 North High Street, Suite 200, Columbus, Ohio 43215

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