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UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In re:	)	Case No. 12-12321 (MG)
	)	
DEWEY & LEBOEUF LLP,	)	Chapter 11
	)	
Debtors.	)	
	)	
ENTEGRA POWER GROUP LLC,	)	
	)	Adv. Proc. No. _____
Plaintiff,	)	
	)	
vs.	)	
	)	**COMPLAINT FOR (I) DECLARATORY JUDGMENT; (II) BREACH OF FIDUCIARY DUTY AND IMPOSITION OF CONSTRUCTIVE TRUST; AND (III) TURNOVER OF FUNDS**
DEWEY & LEBOEUF LLP,	)	
	)	
Defendant.	)	
	)	
	)	

Plaintiff ENTEGRA POWER GROUP LLC., ("**Entegra**" or "**Plaintiff**), by and through its undersigned attorney, files this *Adversary Complaint For (I) Declaratory Judgment; (II) Imposition of Constructive Trust and (III) Turnover of Funds* against defendants DEWEY & LEBOUEF LLP ("**Defendant**", "**Debtor**" or "**Dewey**"), and for its complaint (this "**Complaint**") against Defendant states as follows:

NATURE OF THE ACTION

1. This Adversary Proceeding Complaint arises out of Dewey's post-petition refusal to turn over to Entegra $300,000, which represents a pre-petition retainer (the "**Retainer**") being held by Dewey. Although Entegra paid the full amount of all outstanding fees owed to Dewey prior to its bankruptcy filing, Dewey refuses to return the Retainer to Entegra. Dewey holds no ownership interest in the Retainer and the Retainer does not constitute property of Dewey's bankruptcy estate. Accordingly, Entegra seeks (a) declaratory judgment that under New York law, Dewey and its bankruptcy estate hold no ownership interest in the Retainer; (b) under applicable New York law, a finding that Dewey breached its fiduciary duty to Entegra and that a constructive trust should be imposed upon cash in the hands of the Defendant in an amount sufficient to repay the Retainer in full; and (c) declaratory judgment that Debtor only holds legal title and not an equitable interest in such funds, that a constructive trust is imposed on $300,000, and that such funds are not property of Defendant's bankruptcy estate. The Plaintiff further seeks turnover of the full $300,000.

PARTIES

2. Plaintiff Entegra, is a Delaware limited liability company and a former client of the Debtor.

3. Defendant Dewey, a New York limited liability partnership, is a debtor in the above-captioned Chapter 11 bankruptcy case.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this Adversary Proceeding under 28 U.S.C. §§ 1334(b) and 2201.

5. This Adversary Proceeding is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (O) and is commenced under Rules 7001(1), (2), and (9) of the Federal Rules of Bankruptcy Procedure.

6. Venue of this Adversary Proceeding is proper in this Court under 28 U.S.C. § 1409, in that this Adversary Proceeding arises under, arises in, or is related to a bankruptcy case pending in this District.

ALLEGATIONS COMMON TO ALL COUNTS

Relationship Between Entegra and Dewey

7. On or about April 2, 2004, Entegra's predecessors in interest, Union Power Partners, L.P., Panda Gila River, L.P., Trans-Union Interstate Pipeline, L.P. and UPP Finance Company, LLC, (together, the "**Entegra Predecessors**") entered into an engagement letter ("**Engagement Letter**") with Dewey Ballantine LLP ("**Dewey Ballantine**"), a predecessor by merger to the Defendant.

8. Despite diligent efforts by the Plaintiff, a complete copy of the Engagement Letter cannot be located in Plaintiff's records. Efforts to obtain a complete copy from the Defendant have not been successful. A copy of the portion of Engagement Letter in Entegra's records is attached hereto as Exhibit A.

9. The Engagement Letter provided, in relevant part, that the Entegra Predecessors would provide Dewey Ballantine with a retainer for future fees of $300,000.

The Entegra Bankruptcy

10. On January 26, 2005, the Entegra Predecessors filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. §§ 101-1330 (as amended, the "**Bankruptcy Code**") in the Bankruptcy Court for the District of Arizona (the "**Arizona**

Bankruptcy Court") The bankruptcy cases of the Entegra Predecessors were jointly administered by the Arizona Bankruptcy Court under case number 05-01143.

11. During the course of their bankruptcy proceeding, the Entegra Predecessors sought the Bankruptcy Court's authority to retain Dewey Ballantine as their "Special Corporate Counsel". A copy of the retention application regarding Dewey Ballantine (the "**Retention Application**"), along with the verified statement of Benjamin Hoch (the "**Hoch Statement**"), a former member of Dewey Ballantine,[1] in support of the Application, are annexed hereto as Exhibit B.

12. In the Hoch Statement, Mr. Hoch acknowledged that Dewey Ballantine was holding the full Retainer ($300,000) "for services to be rendered and for expenses to be incurred in connection with its representation of" the Entegra Predecessors. Hoch Statement, ¶ 14.

13. Pursuant to an order of the Arizona Bankruptcy Court dated March 3, 2005 (the "**Retention Order**"), the Entegra Predecessors retained Dewey Ballantine as their "Special Corporate Counsel". A true and accurate copy of the Retention Order is attached hereto as Exhibit C.

14. On July 1, 2005, Dewey Ballantine filed its final fee application in the bankruptcy case of the Entegra Predecessors (the "**Final Fee Application**"). A true and accurate copy of the Final Fee Application is attached hereto as Exhibit D.

15. As indicated in the Final Fee Application, Dewey Ballantine still held the Retainer at the time it made the Final Fee Application. Dewey Ballantine was paid all fees and expenses requested by the Final Fee Application and did not draw upon the Retainer to satisfy those amounts.

[1] Upon information and belief, Mr. Hoch left Dewey Ballantine in December of 2006.

16. On or about June 1, 2005 the Entegra Predecessors emerged from bankruptcy pursuant to a confirmed chapter 11 plan of reorganization as Plaintiff, Entegra Power Group, LLC.

Relationship Following Entegra Bankruptcy and Dewey Ballantine Merger

17. Defendant continued to represent Entegra following the merger of Dewey Ballantine and LeBoeuf, Lamb, Green & MacRae LLP in October of 2007, which resulted in the formation of the Defendant as successor by merger.

18. Defendant continued to represent Entegra until approximately May 11, 2012, when the relationship partner left Defendant.

19. As of May 28, 2012 — the date that the Defendant filed its petition for relief under the Bankruptcy Code (the "**Petition Date**") — all amounts payable by Entegra and Entegra's Predecessors to Defendant for fees and services had been satisfied and no amount was due and owing Defendant.

20. The $300,000 Retainer was never applied to Defendant's invoices for services performed or costs incurred for Entegra since June 1, 2005.

21. Since May 28, 2012, Plaintiff has repeatedly requested that Defendant return the Retainer.

22. On July 19, 2012, Defendant, through its Chief Restructuring Officer, Jonathan A. Mitchell, advised Entegra that the retainer was not segregated from Dewey's general operating account and that the funds would not be returned to Entegra.

23. Defendant has taken the position that because the Retainer was commingled with its general operating account that Entegra is merely an unsecured creditor of the Debtor and refused to return the Retainer. *See, e.g.*, e-mail correspondence attached hereto as Exhibit E.

24. Defendant's commingling of the Retainer in its general operating account did not change the character of the funds provided to Defendant as a Retainer.

25. Defendant no longer has an enforceable interest in the $300,000 and holds only legal title to the Retainer. There are no outstanding invoices or legal services being provided by Defendant to Entegra and thus the $300,000 is not property of Defendant's bankruptcy estate; rather, Entegra holds an equitable interest in the Retainer and is entitled to the immediate return of the Retainer.

COUNT ONE
(Declaratory Judgment Based On New York Law Regarding Retainers)

26. Plaintiff restates and incorporates the allegations set forth in paragraphs 1 through 25 as if fully set forth herein.

27. Rule 1.5 of the Rules of Professional Conduct (the "**Professional Rules**"),[2] which govern the practice of law in New York, provides, in relevant part, as follows:

> (a) A lawyer shall not make an agreement for, charge, or collect an excessive or illegal fee or expense. A fee is excessive when, after a review of the facts, a reasonable lawyer would be left with a definite and firm conviction that the fee is excessive….
>
> (d) A lawyer shall not enter into an arrangement for, charge or collect:
>
> (4) a nonrefundable retainer fee; provided that a lawyer may enter into a retainer agreement with a client containing a reasonable minimum fee clause if it defines in plain language and sets forth the circumstances under which such fee may be incurred and how it will be calculated…

28. Rule 1.15 of the Professional Rules[3] provides, in relevant part, as follows:

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[2] The Professional Rules became effective April 1, 2009 and replaced the prior Disciplinary Rules, which were in effect at the time the Engagement Letter was executed. The Professional Rules generally follow the Model Rules of Professional Conduct, while the Disciplinary Rules followed the Model Code of Professional Responsibility. Current Rule 1.5 is identical to former D.R. 9-102. *See* Roy Simon, Comparing the New NY Rules of Professional Conduct to the NY Code of Professional Responsibility, *available at* http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/CorrelationtableofnewNYrules.pdf (last viewed Sept. 20, 2012).

> (a) A lawyer in possession of any funds or other property belonging to another person, where such possession is incident to his or her practice of law, is a fiduciary, and must not misappropriate such funds or property or commingle such funds or property with his or her own.
>
> (c) A lawyer shall:
>
> (3) maintain complete records of all funds, securities, and other properties of a client or third person coming into the possession of the lawyer and render appropriate accounts to the client or third person regarding them; and
>
> (4) promptly pay or deliver to the client or third person as requested by the client or third person the funds, securities, or other properties in the possession of the lawyer that the client or third person is entitled to receive.

29. Rule 1.16(e) of the Professional Rules[4] provides as follows:

> (e) Even when withdrawal is otherwise permitted or required, upon termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client, including giving reasonable notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, **promptly refunding any part of a fee paid in advance that has not been earned** and complying with applicable laws and rules. (emphasis supplied)

30. New York law recognizes three types of retainers: (a) the "classic retainer fee arrangement," wherein money is paid by the client to the attorney to secure the lawyer's availability over a prescribed period of time; (b) the "security retainer" wherein the attorney holds the money solely to secure the ability of the client to pay for the services the client expects the lawyer to render in the future; and (c) the "advance payment retainer" wherein the client pays the attorney in advance for all or some of the legal services which the attorney is expected to provide the client. *See Ruberto v. DeFilippo*, 913 N.Y.S.2d 889, 891 (N.Y. Civil Ct. 2010).

31. Absent a "security retainer" being specifically created in the retainer agreement, New York treats all such legal fee payments as an "advance payment retainer." *Id.*

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[3] Rule 1.15 is identical to former D.R. 9-102. *See* Simon, *supra* n. 2.

[4] Rule 1.16(e) is substantially similar to D.R. 2-110(a)(2) and (3). *See* Simon, *supra*, n. 2.

32. The client retains an interest in any portion of an advance payment retainer not earned by the lawyer and, at the conclusion of the representation, the lawyer must return any portion of the advance payment retainer that is not earned. *See* N.Y.S.B.A. Op. No. 816 (Oct. 26, 2007).[5]

33. Under New York law, attorneys do not obtain ownership of retainers until they have been earned through the provision of services to, or the incurrence of expenses on behalf of, the client providing the retainer. *Ruberto*, 913 N.Y.S.2d at 892.

34. Under New York law, the client retains an equitable interest in an unearned retainer. *See* N.Y.S.B.A. Op. No. 816; *Ruberto*, 913. N.Y.S.2d at 892.

35. The Retainer was either a security retainer or advance payment retainer.

36. The Retainer was not earned by Defendant because all legal fees and expenses incurred by Defendant on behalf of Entegra have been paid in full.

37. Defendant does not own the Retainer and possesses, at most, only a legal interest in the Retainer.

38. Defendant's representation of Plaintiff has concluded.

39. Defendant is obligated to return the Retainer to Plaintiff under New York law.

COUNT II

(Breach of Fiduciary Duty; Imposition of Constructive Trust)

40. Plaintiff restates and incorporates the allegations set forth in paragraphs 1 through 39 as if fully set forth herein.

41. Under New York law, the attorney-client relationship entails one of the highest fiduciary duties imposed by law. *See The Andy Warhol Found. for Visual Arts, Inc. v. Hayes (In*

[5] *Available* at http://www.nysba.org/AM/Template.cfm?Section=Ethics_Opinions&template=/CM/ContentDisplay.cfm&ContentID=58439 (last viewed Sept. 20, 2012).

re Hayes), 183 F.3d 162, 168 (2d Cir. 1999) (citing *In re Cooperman*, 83 N.Y.2d 465, 472 (N.Y. 1994)).

42. Under New York law, an attorney receiving money that is the property of the client does so in a fiduciary capacity. *In re Gelson*, 12 F. Supp. 924, 925 (E.D.N.Y. 1935).

43. A fiduciary relationship existed between Defendant and Entegra through Defendant's partners and attorneys.

44. Under New York law, a limited liability partnership is bound by the wrongful acts and omissions of any partner acting in the ordinary course of the business of the partnership. N.Y. P'SHIP § 24.

45. At the time the Retainer was received by Defendant, an implicit promise was made in accordance with the Professional Rules that the Retainer would be returned to the extent not earned upon termination of the attorney-client relationship between Defendant and Entegra.

46. The Retainer was transferred to Defendant in reliance upon this implicit promise.

47. Defendant has breached its fiduciary duties to Entegra by refusing post-petition to return the Retainer to Entegra.

48. The Defendant and its estate would be unjustly enriched if the Defendant and its estate are not required to return the Retainer to Entegra.

49. Under New York law, when money is held by a fiduciary and commingled with the personal funds of the fiduciary in a bank account, the law presumes that funds of the fiduciary were exhausted before those of the party delivering funds to the fiduciary. *See Matter of Siegel*, Case No. 332730/H, 2010 N.Y. Misc. LEXIS 5318 at *12-13 (N.Y. Surr. Ct. Sep. 30, 2010) *aff'd* 935 N.Y.S.2d 115 (N.Y. App. Div. 2011) (quoting *Importers' and Traders' Bank v. Peters*, 123 NY 272, 278 (1890)).

50. Under New York law, when a fiduciary breaches their fiduciary duty, the court may assume that any funds in the fiduciary's accounts sufficient to satisfy the fiduciary's obligations to its client belong to the client. *See The Martha Graham School & Dance Found., Inc. v. Martha Graham Center of Contemporary Dance, Inc.*, 224 F. Supp. 2d 567, 611-12 (S.D.N.Y. 2002) *aff'd in relevant part* 380 F.3d 624, 646 (2d Cir. 2004).

51. Defendant has admitted that on the Petition Date it had approximately $13 million in cash; an amount sufficient to repay the Retainer. *See* Declaration of Jonathan A. Mitchell Pursuant to Local Bankruptcy Rule 1007-2 and In Support of Chapter 11 Petition and First Day Motions, filed in Case No. 12-12321, May 28, 2012 [Doc. 2] at ¶ 27.

52. Under controlling Second Circuit precedent, the failure of an attorney to return client funds constitutes a defalcation (*i.e.* a breach of fiduciary duty) and an invalid fee agreement. *See In re Hayes*, 183 F.3d at 172-73.

53. Entegra has been damaged by Defendant's breach of its fiduciary duty to return the Retainer and Entegra is entitled to the return of the Retainer.

54. Defendant's breach of fiduciary duty in failing to return the Retainer is the actual and proximate cause of Entegra's damages.[6]

COUNT III

(Declaratory Judgment Under § 541(d) of the Bankruptcy Code)

55. Plaintiff restates and incorporates the allegations set forth in paragraphs 1 through 53 as if fully set forth herein.

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[6] Entegra was not required to, nor did it, file a proof of claim. New York law provides that Defendant held only legal title to the Retainer and that equitable title remained with Entegra until the Retainer was earned (which it was not). Moreover, Defendant's refusal to turn over the unearned Retainer is a post-petition breach of its fiduciary duty and Entegra is entitled to damages - that is, the return of its property, namely the unearned Retainer. Alternatively, to the extent the Court determines that the Retainer is property of the Defendant's bankruptcy estate, Entegra's claim arose post-petition when Defendant refused to return the unearned Retainer. Defendant has been aware of Entegra's claim since at least July 19, 2012 and has identified Entegra as a creditor in its Schedules.

56. Section 541(d) of the Bankruptcy Code provides, in relevant part, as follows:

> Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest … becomes property of the estate under subsection (a)(1) or (2) of this section *only to the extent* of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold. (emphasis added)

57. Applicable state law determines a debtor and debtor-in-possession's interest in property.

58. Under New York law, Defendant holds, at most, no more than legal title to the Retainer.

59. A constructive trust should be imposed upon such cash of the Defendant in an amount sufficient to repay the Retainer to Entegra and assets held in trust are not property of the Defendant's bankruptcy estate under § 541(d) of the Bankruptcy Code.

REQUESTS FOR RELIEF

WHEREFORE, Plaintiff seeks judgment against the Defendant as follows:

A. As to Count I of this Complaint, Plaintiff prays for declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202 as follows:

(i) Defendant does not own the Retainer under applicable New York law;

(ii) Defendant holds no equitable interest in the Retainer under applicable New York law; and

(iii) Defendant is obligated to return the Retainer to Plaintiff under applicable New York law.

B. As to Count II of this Complaint, Plaintiff prays for the following relief:

(i) judgment in Entegra's favor finding that Defendant has breached its fiduciary duty to Plaintiff by failing to return the Retainer; and

(ii) an award of damages in Entegra's favor and imposition of a constructive trust in the amount of $300,000 on cash currently held by Defendant.

C. As to Count III of this Complaint, Plaintiff prays for declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202 as follows:

(i) The Retainer is not property of Defendant's bankruptcy estate pursuant to § 541(d) of the Bankruptcy Code; or

(ii) In the alternative, an amount of the Debtor's cash sufficient to repay the Retainer is impressed with a constructive trust and, therefore, is not property of the Defendant's bankruptcy estate pursuant to § 541(d) of the Bankruptcy Code.

D. Plaintiff further seeks an order of this Court directing that the Defendant turn over the amount of not less than $300,000 to Plaintiff.

RESPECTFULLY SUBMITTED this 27th day of September, 2012,

SQUIRE SANDERS (US) LLP

/s/ Stephen D. Lerner

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