

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

JENSEN BAIRD GARDNER & HENRY,)

Plaintiff,)

v.)

JERZY WIRTH, et al.,)

Defendants)

No. 2:12-cv-296-JAW

MEMORANDUM DECISION ON MOTION FOR LEAVE TO DEPOSIT FUNDS

The plaintiff law firm, citing Federal Rule of Civil Procedure 67(a) and 28 U.S.C. § 1335, seeks leave to deposit with the court the sum of \$205,223.27, to which it asserts there are at least two claimants. Motion for Leave to Deposit Funds With the Court (“Motion”) (ECF No. 3). One of the claimants, the law firm of Skelton, Taintor & Abbott, through Stephen B. Wade, Esq., opposes the motion. Memorandum in Opposition to Plaintiff’s Motion for Deposit of Funds With the Court (“Opposition”) (ECF No. 15). For the reasons that follow, the motion is granted.

I. Factual Background

The Skelton, Taintor & Abbott firm was retained to represent Myfreemedicine.com, LLC, as the plaintiff in an underlying action, *Myfreemedicine.com, LLC v. Geoffrey J. Hasler, et al.*, No. 2:08-cv-362-JAW. It withdrew from that representation after three years. Affidavit of Stephen B. Wade (“Wade Aff.”) (ECF No. 15-1) ¶¶ 3-6. Well before that withdrawal, the client entered into an agreement with claimant Jerzy Wirth and Airborn, LLC for an assignment and security interest in exchange for money, *id.* ¶ 10, after which the law firm was asked to sign a separate acknowledgment and agreement which stated, *inter alia*, that Wirth’s claims were junior

to the law firm's claim for attorney fees and that the attorney-client agreement between the law firm and the plaintiff client was unchanged. *Id.* ¶¶ 7-8.

Shortly after the claimant law firm withdrew from representing the plaintiff client, Wade corresponded by e-mail with Geoffrey Hasler, one of the defendants in the underlying action. *Id.* ¶ 11. In an e-mail dated March 16, 2011, Hasler stated that, absent agreement "at the appropriate time," his attorney planned to escrow the law firm's claim for \$205,000 in attorney fees. *Id.* On April 8, 2011, Wade wrote an e-mail to Hasler's attorney proposing specific language for a written agreement on this point, including the statement that "the funds will continue to be escrowed until the parties either agree how the proceeds should be divided or a court or arbitrator makes a final decision as to the proceeds." *Id.* ¶ 12. Hasler's attorney indicated by e-mail that he and Hasler agreed to this language. *Id.* ¶ 13.

Thereafter, in accordance with its agreement with Hasler, the law firm did not file suit for its fees. *Id.* ¶ 14. The underlying case settled in December 2011. *Id.* Hasler's attorney entered into an agreement with Wirth pursuant to which Wirth and Airborn agreed that any monies due them from any settlement or verdict in the underlying case would be subject to a lien by Wade for attorney fees. *Id.* ¶ 15.

After the case settled, negotiations between the former plaintiff and the law firm failed. *Id.* ¶ 16. The former plaintiff demanded arbitration before the Fee Arbitration Commission of the Maine Board of Overseers of the Bar. *Id.* The arbitration resulted in a fee award to the law firm and Wade in August 2012 in the amount of \$205,223.27. *Id.* The law firm filed a complaint in the Maine Superior Court (Kennebec County) seeking to reduce the award to a judgment. *Id.* ¶ 17. The court in that case granted the law firm's motion for attachment and trustee process against the funds in the hands of the plaintiff in the instant action, Jensen Baird

Gardner & Henry. *Id.* This attachment took effect before the complaint in interpleader was filed to initiate the instant action. *Id.*

II. Discussion

Invoking Federal Rule of Civil Procedure 67 and this court's Local Rule 67,¹ the plaintiff, Jensen Baird Gardner & Henry, seeks leave to deposit \$205,223.27 with the court, asserting that Wirth and Skelton, Taintor & Abbott both claim these funds. Motion at 1-2. The applicable statute provides, in relevant part:

The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation . . . having in his or its custody or possession money or property of the value of \$500 or more . . . if

(1) Two or more adverse claimants, of diverse citizenship . . . are claiming or may claim to be entitled to such money or property . . . ; and if (2) the plaintiff has deposited such money or property . . . into the registry of the court, there to abide the judgment of the court

28 U.S.C. § 1335(a).

Wirth has not responded to the motion, but he has asserted a claim to the funds. Answer to Complaint for Interpleader (ECF No. 16) ¶¶ 4, 9, 12-13, 25.

Wade and Skelton, Taintor & Abbott (the "Skelton defendants") oppose the motion on several grounds. The first is based on the contention that interpleader is not available when one of the named stakeholders is "independently liable" to the proposed interpleader plaintiff. Opposition at 4-5. Essentially, they claim that, by filing a counterclaim, they have deprived this court of jurisdiction over the interpleader action. *Id.* at 5.

¹ These rules both deal with the deposit of funds into interest-bearing accounts, while the motion specifically seeks placement of the funds in a "non-interest bearing account." Motion at 1. In the absence of any explanation, or even mention, of this discrepancy by Jensen Baird Gardner & Henry, I will direct the clerk's office to comply with the rules.

The only authority cited by the Skelton defendants in support of this argument, *id.*, does not in fact support it. After the excerpt quoted by the Skelton defendants, Wright and Miller go on to say that

it is unfortunate that there is any doubt whether either [Fed. R. Civ. P. 22 or 28 U.S.C. § 1335] is shackled with the ancient and now quite unnecessary no-independent-liability restriction. Contemporary procedure, with its flexible and liberal provisions for joinder of parties and claims, for separate trial of separate issues, for assuring that the right to a jury trial on a particular issue or claim is not impaired, and for shaping the relief to the necessities of the particular case is well adapted to disposing of interpleader cases even when independent liability is asserted. Thus, there is no reason today, under either the statute or the rule, for continuing to honor a limitation on the remedy that has no claim to validity other than that it is old.

7 C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure* (3d ed. 2001) (“FP&P”), § 1706, at 563-64. The restriction has not been adopted by this court, nor, so far as I can tell, by the First Circuit. I see no reason to adopt it in this case.

The Skelton defendants next argue that Wirth’s claim does not “meet a modest level of authenticity and adversity[.]” and that this court, therefore, lacks jurisdiction over the interpleader action. Opposition at 5-7. Specifically, the Skelton defendants point to Wirth’s written agreement recognizing their prior interest. *Id.* at 6. They cite *Equitable Life Assur. Soc. v. Porter-Englehart*, 867 F.2d 79, 84 (1st Cir. 1989), for the basic proposition that the defendants’ claims in an interpleader action “must attain ‘a minimal threshold of substantiality.’” *Id.*

However, in the same quoted passage, the First Circuit goes on to say:

[I]t is immaterial whether the stakeholder believes that all claims against the fund are meritorious. Indeed, in the usual case, at least one of the claims will be very tenuous. The threat of possible multiple litigation—not necessarily the likelihood of duplicative liability—justifies resort to interpleader. *See, e.g., Underwriters at Lloyd’s v. Nichols*, 363 F.2d 357, 365 (8th Cir. 1996) (interpleader statute designed not only to protect

stakeholders from multiple liability but also to save them from expense of multiple litigation).

Id. (one citation and internal punctuation omitted). As I have already noted, Wirth in his answer to the complaint in this action claims that the funds should go to him. Nothing further is required to allow this action to proceed.

The Skelton defendants' final argument, to which the plaintiff does not respond in its reply memorandum, is that the attachment of these funds by the Maine Superior Court bars this court from taking custody of the funds. Opposition at 7-8. They assert that, should this court take possession of the funds, it will inevitably "lose its attachment." *Id.* at 7. They posit a finding by "this Court or an appeals court" that there is no jurisdiction in the federal courts or that either court will decline jurisdiction, leaving them "with a dissolved attachment." *Id.* Neither alternative is likely.

True, if a state action already underway provides an adequate remedy, then this court may decline to consider the interpleader action, or, in the alternative, it may stay the federal action. FP&P § 1704. However, in all of the case law listed in Wright & Miller for that proposition, a crucial factor was the presence in the state-court action of all the parties that would be involved in the federal interpleader action. It is clear from the Skelton defendants' own submission² that Wirth is not a party to the state-court action in which the attachment was issued. Thus, I cannot conclude that the current action in state court provides an adequate remedy for the plaintiff in this action.

² "[I]f Mr. Wirth wishes he can avail himself of the procedures set out in 14 M.R.S.[A.] § 4251" after the Skelton defendants are awarded the disputed funds by the state court. Opposition at 8.

III. Conclusion

For the foregoing reasons, the plaintiff's motion for leave to deposit funds with the court is **GRANTED**. The Skelton defendants have requested, should this be my ruling on the motion, that I order "the posting of a bond in lieu of deposit" or "delaying the deposit for a modest time to allow [Skelton, Taintor & Abbott] to perfect its interest."

The court has not been provided with sufficient information to allow it to proceed with either requested alternative. The plaintiff is hereby ordered not to deposit the funds at issue until 10 business days after the date of this opinion, during which time Skelton, Taintor & Abbott may provide the court with current information about the status of the state-court action and any authority supporting its requested alternatives. Should Skelton, Taintor & Abbott submit such information, I will thereafter take further action with respect to the requested alternatives.

In accordance with Federal Rule of Civil Procedure 72(a), a party may serve and file an objection to this order within fourteen (14) days after being served with a copy thereof.

Failure to file a timely objection shall constitute a waiver of the right to review by the district court and to any further appeal of this order.

Dated this 28th day of December, 2012.

/s/ John H. Rich III
John H. Rich III
United States Magistrate Judge

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