

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF KENTUCKY  
Lexington Division

|                                      |   |                                     |
|--------------------------------------|---|-------------------------------------|
| <b>IN RE:</b>                        | : | <b>Chapter 7</b>                    |
|                                      | : | <b>Case No. 10-52848</b>            |
| <b>LISBETH ANN MICEK,</b>            | : | <b>Judge Joseph M. Scott</b>        |
|                                      | : |                                     |
| <b>Debtor.</b>                       | : |                                     |
| <hr/>                                |   |                                     |
| <b>ALLEN McKEE DODD and</b>          | : |                                     |
| <b>DODD AND DODD ATTORNEYS, PLLC</b> | : |                                     |
|                                      | : |                                     |
| <b>Plaintiffs,</b>                   | : | <b>Adv. Proceeding No. 11-05048</b> |
|                                      | : |                                     |
| <b>v.</b>                            | : |                                     |
|                                      | : |                                     |
| <b>LISBETH ANN MICEK,</b>            | : |                                     |
|                                      | : |                                     |
| <b>Defendant.</b>                    | : |                                     |
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**ORDER DENYING CROSS-MOTIONS FOR SUMMARY JUDGMENT**

Before the Court are (i) the Motion for Summary Judgment and Supporting Memorandum (“Dodd Motion”) (Doc. 13) filed by Plaintiffs, Allen McKee Dodd (“Mr. Dodd”) and the firm of Dodd and Dodd Attorneys, PLLC (collectively with Dodd, the “Plaintiffs”) and (ii) the Motion for Summary Judgment of Dismissal of All Counts of the Complaint (Rule 56) (“Micek Motion”) (Doc. 14) filed by the Debtor, Lisbeth Ann Micek (“Ms. Micek” or “Debtor”). The parties filed Corrected Joint Stipulations of Fact and Admissibility of Exhibits (“Stipulations”) (Doc. 9) and Responses (Docs. 16 & 17) to each other’s summary judgment motion and this matter was taken under submission.

This matter concerns whether Plaintiffs have a statutory attorney’s lien pursuant to Kentucky Revised Statute § 376.460 (“Lien”); whether the Lien remains valid after Debtor’s discharge; whether Plaintiffs may enforce the Lien without violating the discharge injunction; whether the Plaintiffs are estopped from enforcing the Lien; and whether the Lien is enforceable

against Debtor's post-petition child support, alimony, maintenance and/or support payments Debtor is receiving as a result of Plaintiffs' efforts in Debtor's divorce action.

This Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1334(b), and this is a core proceedings pursuant to 28 U.S.C. § 157(b)(2)(A) and (K).

### **SUMMARY JUDGMENT STANDARD**

Pursuant to Federal Rule of Bankruptcy Procedure 7056, Federal Rule of Civil Procedure 56 applies in adversary proceedings.

[O]n several occasions, the Court of Appeals for the Sixth Circuit has described the standard to grant a motion for summary judgment as follows:

A court must grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Under this test, the moving party may discharge its burden by "pointing out to the [bankruptcy] court . . . that there is an absence of evidence to support the nonmoving party's case."

*Buckeye Retirement Co., LLC, Ltd., v. Swegan (In re Swegan)*, 383 B.R. 646, 652-53 (B.A.P. 6th Cir. 2008) (quoting *Gibson v. Gibson (In re Gibson)*, 219 B.R. 195, 198 (B.A.P. 6th Cir.1998)). "We review cross motions for summary judgment under this standard as well, evaluating each motion on its own merits." *La Quinta Corp. v. Heartland Props. LLC*, 603 F.3d 327, 335 (6th Cir. 2010). The Supreme Court has instructed that a court must look beyond the pleadings and assess the proof needed to determine whether there is a genuine need for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 547, 587 (1986).

### **VIOLATION OF DISCHARGE INJUNCTION – ADVISORY OPINION**

This Court has previously decided that rendering a decision on whether filing a post-discharge action against a debtor will violate the discharge injunction of 11 U.S.C. § 524 places the Court in the position of rendering an advisory opinion. See *In re B. J. Brown Sheet Metal, Inc.*, Case No. 08-53321, slip op. at 1 (Bankr. E.D. Ky. Dec. 20, 2010); see also *Alabama Power Co. v. Clean Earth Ky., LLC (In re Clean Earth Ky., LLC)*, 312 Fed. Appx. 718, 719 (6th Cir. 2008) (judiciary is empowered to "adjudicate only actual cases or controversies, and not to issue

advisory opinions”). The Plaintiffs have not filed a state court action. The requirement that an actual case or controversy exists prevents the Court from deciding cases based upon hypothetical facts. *Hutchison v. Bingham (In re Hutchison)*, 270 B.R. 429, 436 (Bankr. E.D. Mich. 2001). As such, the Court denies the Dodd Motion to the extent that Plaintiffs request the Court make a specific finding that their proposed state court action against Ms. Micek to enforce the Lien will not violate the discharge injunction.

### VALIDITY AND EXTENT OF THE LIEN

The parties have agreed to certain facts set forth in their Stipulations. However, they did not stipulate to facts sufficient for the Court to determine the validity and extent of Plaintiffs’ Lien—in the event they have a Lien to assert.<sup>1</sup> To determine the validity of any lien, the Court agrees with Ms. Micek that it must consider whether the Plaintiffs are estopped from enforcing the Lien. “The doctrine of equitable estoppel allows a person’s act, conduct or silence when it is his duty to speak, to preclude him from asserting a right he otherwise would have had against another who relied on that voluntary action.” *In re Hawkins*, 377 B.R. 761, 770 (Bankr. S.D. Fla. 2007).

In order to prevail on a theory of estoppel, there must be proof not only of an intent to induce action or inaction on the party to be estopped, but also of reasonable reliance by the party claiming the estoppel. Indeed in *Weiland, supra*, the Kentucky Supreme Court set out the essential elements of equitable estoppel as:

(1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. And, broadly speaking, as related to the party claiming the estoppel, the essential elements are (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.

*Weiland v. Board of Trustees of Kentucky Retirement Systems*, 25 S.W.3d 88, 91 (Ky.2000) (internal citations omitted).

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<sup>1</sup> Ms. Micek has not stipulated that the Plaintiffs possess a statutory lien pursuant to KRS § 376.460.

*Kindred Hosps. Ltd. P'ship v. Smith*, 2011 WL 4409599 at \*3-4 (Ky. App. Sept. 23, 2011). The determination of whether the Plaintiffs are estopped from asserting the Lien involves questions of material fact as to the intention and expectations of the Plaintiffs as well as the knowledge and reliance of Ms. Micek on the actions or inactions of the Plaintiffs. As such summary judgment is not appropriate in this case.

### CONCLUSION

Accordingly, being otherwise sufficiently advised, the Court **DENIES** the Dodd Motion and the Micek Motion. By separate Order, the Court will set this adversary proceeding for trial.

Copies to:  
Dean A. Langdon, Esq.  
W. Thomas Bunch, Sr., Esq.

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***The affixing of this Court's electronic seal below is proof this document has been signed by the Judge and electronically entered by the Clerk in the official record of this case.***



**Signed By:**  
**Joseph M. Scott, Jr.**  
**Bankruptcy Judge**  
**Dated: Friday, March 30, 2012**  
**(jms)**