SIGNED THIS 16th day of December, 2019

THIS MEMORANDUM OPINION HAS BEEN ENTERED ON THE DOCKET. PLEASE SEE DOCKET FOR ENTRY DATE.

Paul M. Black
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

IN RE:	)	
	)	
RUSSELL M. COLLINS	)	**CHAPTER 7**
APRIL P. COLLINS,	)	
	)	
Debtors.	)	**CASE NO. 15-71683**
	)	
ROBIN W. GREENAWALT,	)	
UNIQUE CREATIONS ON MAIN, INC.,	)	
and MAIN STREET PRESERVATION, LLC	)	
Movants,	)	
	)	
v.	)	
	)	
WILLIAM E. CALLAHAN, JR.	)	
Respondent.	)	

MEMORANDUM OPINION

This matter comes before the Court on a Motion for Enforcement of Settlement (the "Enforcement Motion") filed by Robin W. Greenawalt, Unique Creations on Main, Inc., and Main Street Preservation, LLC ("Movants") against the Chapter 7 trustee, William E. Callahan, Jr. (the "Trustee"). The Trustee filed an objection to the Enforcement Motion stating that the agreement was subject to conditions precedent that were not met. On October 21, 2019, the

Court conducted an evidentiary hearing. At the evidentiary hearing, counsel for Robin W. Greenawalt and Unique Creations on Main, Inc., J. Peter Richardson, and the Trustee testified. At the conclusion of the hearing, the Court took the matter under advisement. The Court gave the parties an opportunity to file briefs addressing arguments raised at the hearing. Both parties filed briefs and responses and the matter is now ready for decision. For the following reasons, the Court finds that a valid settlement agreement existed, and a further hearing will be held on the Enforcement Motion for the Court to determine whether to approve the settlement agreement.

FINDINGS OF FACT

Russell McKinley Collins and April Peyton Collins (the "Debtors") filed a voluntary Chapter 13 petition in this Court on November 30, 2015. The case was converted to a Chapter 7 on March 13, 2017. (Docket No. 36). After conversion, William E. Callahan, Jr. ("Trustee" or "Callahan") was appointed as trustee. The Debtors' original schedules filed with the petition showed state court litigation in Montgomery County, *April P. Collins and Unique Creations Salon, Inc. v. Robin W. Greenawalt*[1] *and Unique Creations on Main, Inc.* ("2014 litigation"), as an asset with an unknown value. April Peyton Collins (the "Female Debtor") was represented in the state court litigation by attorneys from Creekmore Law Firm and the Defendants were represented by J. Peter Richardson ("Richardson").

On September 19, 2019, Robin W. Greenawalt, Unique Creations on Main, Inc., and Main Street Preservation, LLC (the "Movants") filed the Motion because, according to the Movants, the parties had reached an enforceable settlement agreement and asked the Court to require the Trustee to file and present the settlement for approval under Rule 9019. (Docket No.

[1] The Debtors' Schedule B lists the litigation as pending against Robin W. Greenwalt. However, the Enforcement Motion and other exhibits presented at the hearing on this matter refer to Robin W. Greenawalt. Therefore, the Court will refer to the party as Ms. Greenawalt.

93). On October 14, 2019, the Trustee filed a Response to the Enforcement Motion, stating that the settlement agreement was tentative and subject to at least three conditions precedent that were not satisfied. (Docket No. 95). On October 21, 2019, the Court held a hearing on the Motion. At the hearing, Richardson testified that he spoke with the Trustee by telephone on April 12, 2017 to discuss whether the Trustee would be interested in (i) settling the claims of Collins and (ii) selling Collins' 50% holding in stock of Unique Creations Salon, Inc.to his client. He further testified that the Trustee indicated his willingness to consider the settlement. Richardson testified that he followed up with the Trustee on May 2, 2017 at which time he asked the Trustee for a number to settle the 2014 litigation. The Trustee indicated that he was willing to settle the 2014 litigation for $6,191.00, which included $6,000.00 in cash and $191.00 for publication costs. Richardson further testified that he responded that he did not have the authority at that amount but would contact his client and ask about settling at that amount. Richardson then testified that he called the Trustee and told him that his client was interested, but the funds were not available immediately and he would call once the funds were in his trust account. On June 8, 2017, Richardson sent an email stating "Ms. Greenawalt has authorized me to offer you, as trustee, $6,191.00 in settlement of all claims asserted by Ms. Collins against Ms. Greenawalt and Unique Creations on Main, Inc. in *Collins, et al. v. Greenawalt, et al*., and to purchase Ms. Collins' 20 shares, being 50 per cent of the outstanding shares. [sic] of the common stock in Unique Creations Salon, Inc." Ex. 1. Richardson testified that this email was sent to make acceptance of the settlement that Callahan orally made. Callahan's position is that this was an offer -- not an acceptance.

On June 9, 2017, the Trustee sent an email stating "Thank you. I will designate this case as an asset case on Monday and be back in touch regarding starting the process." Ex. 2.

Richardson testified that there were no explicit conditions to acceptance of the settlement. On June 12, 2017, the Trustee requested that the Clerk issue an asset notice. (Docket No. 51). On June 13, 2017, the Trustee asked Richardson via email, "Do you have a form of a sale and settlement agreement you would suggest we use or do you want me to put something together?" Ex. 3. On June 19, 2017, the Trustee emailed Richardson stating that he "requested the stock certificate from Ms. Collins." Ex. 3.

On January 7, 2016, the Female Debtor and Unique Creations Salon, Inc. commenced a lawsuit against Joseph L. Simmons, Asset Solutions Corporation, and Main Street Preservation, LLC for claims arising from a contract (the "2016 litigation"). The Trustee testified that he did not find out about the related 2016 litigation until June 22, 2017 when he received a call from the Creekmore Law Firm advising him that there was litigation related to the 2014 litigation pending in Montgomery County. He testified that he contacted Debtors' counsel and advised that he needed to file an amended Schedule B to include the 2016 litigation as an asset of the estate. Debtors' counsel filed an amended Schedule B on June 29, 2017. (Docket No. 59).

On July 11, 2017, Richardson forwarded certain information along with a draft "release" to the Trustee. Ex. 3. The Trustee responded stating "Am I correct in thinking that I am going to release Ms. Collins' claims against Ms. Greenawalt and after the contemporaneous sale of Ms. Collins' share, she will be in control of the other plaintiff and can, in effect, cause the corporation to release her as well? I have also realized that because the corporation is also a plaintiff in the Simmons case, I will need to get that one settled at the same time and get some sort of waiver of any interest in that litigation by the corporation as part of the whole deal." Ex. 4. The Trustee contends Richardson knew about the 2016 litigation and did not tell him about it.

On July 13, 2017, the Trustee filed an application to employ the Creekmore Law Firm, stating "[t]he Trustee has tentatively settled the action against Robin Greenawalt, subject to approval of the United States Bankruptcy Court." (Docket No. 62). On October 25, 2017, Richardson followed up to inquire about the status of settlement of the case. Ex. 7. On November 7, 2017, Callahan replied, "As I have indicated, I need to achieve a settlement or a disposition of the other claim asserted by Ms. Collins in Montgomery County before completing this agreement." *Id.*

At trial, Callahan testified that he did not specifically remember the conversation between himself and Richardson but that there were two conditions precedent to the settlement being accepted by the Trustee: (1) that there be an agreement setting forth terms and (2) that the Court approve the settlement. He testified that this was his practice as Trustee for the 20 years he has been serving on the trustee panel, although he did not have a specific recollection of that statement being made in this case. In contrast, Richardson testified that the parties reached a settlement on May 2, 2017 when the Trustee and Richardson made an oral agreement to settle the 2014 litigation. He further testified that the settlement was not subject to any conditions. At the conclusion of the hearing, the Court took the matter under advisement and requested that the parties submit memorandums of law addressing two issues: (i) what evidence shows a binding settlement was or was not reached and (ii) whether the agreement must be approved by the Court pursuant to Federal Rule of Bankruptcy Procedure 9019(a). The Trustee and the Movants submitted memorandums of law and responses to the memorandums of law.

For the following reasons, the Court finds that a binding settlement agreement was reached by the parties, but a further hearing must be held for the Court to determine whether to approve the settlement agreement as fair and equitable and in the best interests of the estate.[2]

JURISDICTION

This Court has jurisdiction of this matter by virtue of the provisions of 28 U.S.C. §§ 1334(a) and 157(a) and the referral made to this Court by Order from the District Court on December 6, 1994 and Rule 3 of the Local Rules of the United States District Court for the Western District of Virginia. This Court further concludes that this matter is a "core" bankruptcy proceeding within the meaning of 28 U.S.C. § 157(b)(2)(A).

CONCLUSIONS OF LAW

The first issue is whether under Virginia law the parties reached a binding contract to settle a claim. The Court finds that the parties reached an agreement to settle the 2014 litigation on May 2, 2017. Under Virginia Law, a contract is formed when there is an offer, acceptance of that offer, and consideration. *Snyder-Falkinham v. Stockburger*, 249 Va. 376, 385, 457 S.E.2d 36, 39 (1995). "An oral contract to settle a dispute is enforceable so long as all of the elements for a contract to be formed exist and the terms are reasonably certain, definite and complete to enable the parties and courts to give the exact meaning to the agreement." *In re Frye*, 216 B.R. 166, 171 (Bankr. E.D. Va. 1997) (internal citations omitted). Here, the Trustee made an oral

[2] *In re Gordon Properties, LLC*, 515 B.R. 454, 465 (Bankr. E.D. Va. 2013), citing *Wood v. Cumulus Broadcasting LLC* (*In re Wood*), No. 00-144602008 WL 2244972 (Bankr. E.D. Va. 2008), and *In re Frye,* 216 B.R. 166 (Bankr. E.D. Va. 1997), sets forth the following standard in approving settlements: "The proposed settlement must be both (1) in the best interest of the estate and (2) fair and equitable. The [*Frye*] court listed four typical factors to determine whether the proposed settlement agreement was in the best interests of the estate: the probability of success in litigation, the potential difficulties in collection, the complexity of the litigation including the cost, inconvenience and delay, and the 'paramount interest of the creditors.' It prefaced the list with the statement that 'These factors include'—a preface that indicates that the listed factors are not the only factors that may be considered." *Id.* at 465.

offer during the May 2, 2017 phone call with Richardson when he stated that he was willing to settle the 2014 litigation for $6,191.00. Richardson accepted the Trustee's offer in his email dated June 8, 2017. The Trustee's immediate reply that he would send out an asset notice after a deal was reached is confirmation of that fact. If no agreement was made, there would be no other reason for the Trustee to send an asset notice to creditors in this case. Further, there is consideration as "[i]t is settled law in Virginia that the termination of a disputed claim is valid and sufficient consideration to support a settlement agreement." *Id.* (internal citations and quotations omitted). Thus, the parties entered into a valid contract to settle the 2014 litigation.

There is no persuasive evidence the settlement contract was made explicitly subject to a formal writing. In *Snyder-Falkinham*, the court held that "the mere fact that a later formal writing is contemplated will not vitiate the agreement," finding that the parties had fully agreed upon the settlement terms and both intended to be bound by the settlement. *Id.* at 385, 457 S.E.2d at 41. Although Richardson sent the Trustee a draft release agreement, there is no evidence on which the Court could conclude that the parties were not bound by the oral agreement.

"Once a competent party makes a settlement and acts affirmatively to enter into such settlement, her second thoughts at a later time upon the wisdom of the settlement do not constitute good cause for setting it aside." *Snyder-Falkinham*, 249 Va. at 385, 457 S.E.2d at 41. Although the Trustee indicates that the 2016 litigation was not disclosed by Richardson, the parties entered into a valid contract to settle the 2014 litigation. A settlement cannot be set aside merely because the bankruptcy court has not yet approved it. As stated by Judge Mayer in *Wood v. Cumulus Broadcasting LLC (In re Wood)*, No. 00-14460, 2008 WL 2244972 (Bankr. E.D. Va. May 30, 2008):

> The better resolution is to recognize that contract formation and court approval of proposed contracts are different and serve different purposes. This recognizes long-established state law with respect to contract formation and protects estates from improvidently agreed-upon contracts. There is no doubt that the court can reject a proposed agreement. But, that does not mean that the proposed agreement has no efficacy before it is either approved or rejected. The parties are committed to the agreement once they execute it. This is in accordance with ordinary contract law. The difference in bankruptcy is that the contract must ultimately be approved by the bankruptcy court because of the involvement of third parties such as creditors so that their interests are protected. It does not, however, prevent the formation of a contract. The formation of the contract is a condition precedent to court approval. Once the contract is made, neither party can withdraw except in accordance with the agreement of the parties even though the contract has yet to be approved by the court.
>
> It may be that at the hearing on court approval, a party that wishes to withdraw may have sufficient reason to show that the contract should not be approved by the bankruptcy estate.

Id. at *3. A more common reason for a Trustee to not support court approval of contract is that he has received a higher and better offer in the interim. *Id.*

While the Fourth Circuit has not addressed the issue of whether court approval is mandatory under Rule 9019, other courts have addressed the issue. The "majority view" is that settlement is only enforceable if the bankruptcy court has approved the settlement. *See Salim v. Nisselson (In re Big Apple Volkswagen, LLC)*, 571 B.R. 43, 54 (S.D.N.Y. 2017); *see also Travelers Ins. Co. v. Am. AgCredit Corp. (In re Blehm Land & Cattle Co.)*, 859 F.2d 137, 141 (10th Cir. 1988) ("Under Bankruptcy Rule 9019, a settlement or compromise agreement between the trustee and a party must be approved by the court, after notice and hearing, to be enforceable.").

While some courts have reached the opposite conclusion[3], this Court agrees with the majority view that a settlement is only enforceable if the bankruptcy court has approved it.

[3] *See In re Dalen*, 259 B.R. 586, 599 (Bankr. W.D. Mich. 2001) (The court found that "Congress intended the settlement approval process referenced in the Bankruptcy Rules to be discretionary, not mandatory."); *see also In re*

"Bankruptcy is a community, multi-party proceeding seeking to adjust the obligations of the parties fairly among all the creditors and interested parties. The purpose of court approval is to protect all of the creditors and interested parties of the estate and to assure that the proposed agreement is fair and reasonable under the circumstances." *Wood*, at *2. Thus, while the parties have formed a valid contract to settle the 2014 litigation, the agreement still must be approved by the Court.

CONCLUSION

For the foregoing reasons, the Court finds that the parties formed a valid contract to settle the *April P. Collins and Unique Creations Salon, Inc. v. Robin W. Greenawalt and Unique Creations on Main, Inc.* litigation. However, the Court finds that the settlement must be approved by the Court pursuant to Rule 9019 and will set a hearing on the matter where both parties may present evidence on whether the Court should approve the agreement.[4]

A separate Order will be entered contemporaneously herewith.

Telesphere Commc'ns, Inc., 179 B.R. 544 (Bankr. N.D. Ill. 1994) (stating that court approval of a compromise is not necessary unless it is required by a provision of the Bankruptcy Code).

[4] At the hearing, the Trustee made it clear he would not be recommending the settlement if a further hearing were to be held. The Court understands the Trustee's position.