

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

Hearing Date: April 23, 2013 at 10:00 a.m.
Objection Date: April 16, 2013 by 5:00 p.m.

-----X
In the Matter of

Chapter 7

MIDDLE BAY GOLFERS' ASSOCIATION, INC.

Case No.: 13-70361-dte

Debtor.
-----X

NOTICE OF MOTION

PLEASE TAKE NOTICE that, Kenneth Kirschenbaum, the Chapter 7 Trustee (the "Trustee") for the estate (the "Estate") of Middle Bay Golfers' Association, Inc., by and through his attorneys, Kirschenbaum & Kirschenbaum, P.C., will move this Court, before the Honorable Dorothy T. Eisenberg, United States Bankruptcy Judge, at the United States Bankruptcy Court, Long Island Federal Court House, 290 Federal Plaza, Courtroom 760, Central Islip, New York, on **April 23, 2013 at 10:00 a.m.**, or as soon thereafter as counsel can be heard, for an Order pursuant to 11 U.S.C. § 105(a): (a) authorizing the Trustee to disburse the sum of \$1,848.78 to Interstate Adjusters, Inc.; and (b) granting such other and further relief as this Court deems just and appropriate.

PLEASE TAKE FURTHER NOTICE that objections, if any, to the proposed order should be in writing and filed with the Clerk of the Bankruptcy Court, with a copy marked for the Chambers of the Honorable Dorothy T. Eisenberg, in accordance with the Local Rules for the United States Bankruptcy Court, Eastern District of New York, E.D.N.Y. LBR 2002-1(d), and served upon Kirschenbaum & Kirschenbaum, P.C., Attorneys for the Trustee, 200 Garden City Plaza, Suite 500, Garden City, New York 11530, Attention: Stacy Spector, Esq., and upon the United States Trustee, Long Island Federal Courthouse, 560 Federal Plaza, Central Islip, New

York 11722, so as to actually be received no later than 5:00 p.m. on April 16, 2013 by 5:00 p.m.

Dated: Garden City, New York
March 27, 2013

KIRSCHENBAUM & KIRSCHENBAUM, P.C.
Attorneys for the Trustee

By: s/ Stacy Spector
Stacy Spector, Esq.
200 Garden City Plaza
Garden City, NY 11530
(516) 747-6700

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

-----X

In the Matter of

MIDDLE BAY GOLFERS' ASSOCIATION, INC.

Debtor.

-----X

Chapter 7

Case No.: 13-70361-dte

**TRUSTEE'S MOTION TO DISBURSE PAYMENT TO
INTERSTATE ADJUSTERS, INC.**

Kenneth Kirschenbaum, the Chapter 7 Trustee (the "Trustee") for the estate (the "Estate") of Middle Bay Golfers' Association, Inc. (the "Debtor"), by and through his counsel, Kirschenbaum & Kirschenbaum, P.C., hereby submits this motion (the "Motion"), which seeks the entry of an order, pursuant to 11 U.S.C. § 105(a): (a) authorizing the Trustee to disburse the sum of \$1,848.78 to Interstate Adjusters, Inc.; and (b) granting such other and further relief as this Court deems just and appropriate.

Jurisdiction and Venue:

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334.
2. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A).
3. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

Background:

4. On January 23, 2013 (the "Petition Date") the Debtor filed a voluntary petition (the "Petition") for relief pursuant to Chapter 7 of Title 11 of the United States Code (the "Bankruptcy Code"). Kenneth Kirschenbaum was appointed as the Chapter 7 Trustee, and in which capacity he continues to serve.

5. At the time of the filing of the Petition, the Debtor operated a country club and a 16,000 yard golf course known as the Middle Bay Country Club located on the water at 3600 Skillman Ave, Oceanside, New York 11572 (the “Premises”). As a result of Superstorm Sandy, the Debtor was devastated and the damage resulted in the closing of the Debtor’s operation and the instant Chapter 7 bankruptcy filing.

6. In August of 2011, approximately one year prior to the damage to the Premises caused by Superstorm Sandy, the Debtor was damaged due to Hurricane Irene. In connection with the damage sustained by Hurricane Irene to both the country club and the golf course located at the Premises, the Debtor engaged the services of Interstate Adjusters, Inc. (“Interstate”) to assist the Debtor in recovering under the Debtor’s various insurance policies.

7. Pursuant to the retainer (the “Retainer”) between the Debtor and Interstate, annexed hereto as Exhibit “A”, Interstate agreed “to advise and assist in the preparation, presentation and adjustment of the claim for the loss of damage by wind” sustained by the Premises. The Retainer further provided that, in exchange for its services, Interstate would be compensated at a fee of ten percent (10%) of the recovered loss from the insurance companies.

8. As a result of its efforts, Interstate recovered various sums on behalf of the Debtor, and those sums were turned over to the Debtor prior to the Petition Date.

9. On November 12, 2012, Illinois National Insurance Co. issued an additional check in the sum of \$18,487.79, representing additional recovery on the Hurricane Irene insurance claims (the “Irene Recovery”). The check named the Debtor and Interstate as co-payees.

10. The Irene Recovery was not turned over to the Debtor prior to the Petition Date. The Trustee learned about the Irene Recovery after his appointment, and the Trustee requested

that the funds be turned over to the Debtor's Estate. Pursuant to said request, Interstate turned over the Irene Recovery on or about February 15, 2013.

Relief Requested:

11. Interstate has asserted, in accordance with the Retainer, an equitable lien against the Irene Recovery in the sum of \$1,848.78, representing ten percent of the Irene Recovery. Interstate has further asserted full ownership of the \$1,848.78 and maintains that such funds are not property of the Debtor's Estate. As such, Interstate has requested that the Trustee disburse to Interstate the sum of \$1,848.78.

12. "In bankruptcy the existence and power of liens is controlled by state law, unless its application would frustrate a federal policy. *Lewis v. Diethorn*, 893 F.2d 648, 650 (3d Cir. 1990) (citing *In re Taddeo*, 9 B.R. 299, 305 (Bankr. E.D.N.Y. 1981)). New York allows for the imposition of an equitable lien on property if the party asserting the equitable lien can establish the existence of an express or implied contract. The contract in question "must identify the property directly, or describe the property in such a way as to make identification possible, and must clearly state the parties' intention that the identified property be 'held, given or transferred as security for [an] obligation.'" *Security Pacific Mortg. & Real Estate Services, Inc. v. Republic of Philippines*, 962 F.2d 204, 208-209 (2d Cir. 1992) (quoting *James v. Alderton Dock Yards*, 256 N.Y. 298, 303, 176 N.E. 401 (1931)); see *Pu v. Grubin (In re Food Mgmt. Group, LLC)*, 484 B.R. 574, 587 (S.D.N.Y. 2012).

13. The Retainer states: "Middle Bay Country Club hereby retains INTERSTATE ADJUSTERS, INC. to advise and assist in the preparation, presentation and adjustment of the claim for the loss or damage by wind sustained at 3600 Skillman Ave, Oceanside, NY 11572 on 8/28, 2011, and agrees to pay them for such services a fee of 10% (ten) of the amount of the loss,

including salvage when adjusted or otherwise recovered from the insurance companies regardless to whom said loss is payable.” Exhibit A. The Retainer further provides that if the contract is cancelled within three business days, then “any security interest arising out of the contract will be cancelled.” *Id.*

14. While case law dealing with an insurance adjuster’s equitable lien against recovered proceeds is scant, Interstate’s position is supported by the bankruptcy case of *Kramer v. Alston (In re Alston)*, 322 B.R. 265, 266 (Bankr. D.N.J. 2005). In *In re Alston*, the bankruptcy court analyzed New Jersey case law and determined that an insurance adjuster held an equitable lien in fire insurance proceeds that were recovered and turned over after the filing of the debtors’ chapter 13 petition. *Id.* The insurance adjuster had entered into a retainer agreement with the debtors, had expended effort and resources in recovering the insurance proceeds and believed he would be compensated out of said insurance proceeds. *Id.* at 269.

15. Like in *In re Alston*, Interstate entered into a retainer agreement with the Debtor, facilitated in the recovery of the insurance proceeds in connection with Hurricane Irene and expected to be compensated for its efforts. Furthermore, the Interstate Recovery was turned over to the Trustee after the filing of the Debtor’s Petition, and it is against those proceeds that Interstate asserts an equitable lien and seeks compensation.

16. The Trustee has reviewed the Retainer and relevant case law, and has engaged in communications with Interstate’s counsel regarding Interstate’s claimed equitable lien. Upon consideration of same, the Trustee has no objection to disbursing a payment from the Debtor’s estate to Interstate for the sum of \$1,848.75, representing Interstate’s ten percent (10%) interest in the Irene Recovery.

17. No prior application for the relief requested herein has been made to this or any other Court.

WHEREFORE, the Trustee requests that the relief requested herein be granted in its entirety.

Dated: Garden City, New York
March 27, 2013

KIRSCHENBAUM & KIRSCHENBAUM, P.C.
Attorneys for the Chapter 7 Trustee

By: /s/ Stacy Spector
Stacy Spector, Esq.
200 Garden City Plaza - Suite 500
Garden City, NY 11530