

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
)	
DANIEL W. OLSON,)	CASE NO. BK94-80157
)	
DEBTOR)	CH. 7

ORDER

Hearing was held on July 6, 1994, on the Objection to Claim of Exemptions filed by the Trustee. Appearing on behalf of debtor was Rad Clemens of Omaha, Nebraska. Appearing on behalf of the trustee was Thomas Stalnaker of Stalnaker, Becker, Buresh, Gleason & Farnham, P.C., Omaha, Nebraska. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(B).

Background

The debtor, Daniel W. Olson, filed a petition for Chapter 7 Bankruptcy relief on February 2, 1994. In his Schedules, he listed the following property as exempt pursuant to **Neb. Rev. Stat. § 25-1552** (Reissue 1988):

Cash on Hand		\$ 20.00
Accounts in fin. inst.		\$ 40.00
Security deposits		\$ 300.00
Books, pict., etc.		\$ 100.00
Personal costume jewelry		\$ 150.00
Firearms and sports equip.		\$ 50.00
401(k) plan		\$ 100.00
TRW claim	amount	unknown
Fed. and St. tax refund	amount	unknown
Office equipment		\$ 50.00
1978 Dodge van		\$ 400.00
1981 Chevy cutaway		\$1,100.00

Filing no. 1, Schedule C.

The trustee, Thomas D. Stalnaker, objected to the debtor's claim of exemptions. Filing no. 9. The trustee asserted that Section 25-1552 of the Nebraska Revised Statutes limits the total amount of exemptions pursuant to the section to \$2,500, and the debtor's claim of exemptions exceeds that dollar limitation.

The debtor resisted the trustee's objection. Filing no. 11. The debtor filed an amendment to Schedule C, which revalued some of the assets that the debtor claimed under Section 25-1552 of the Nebraska Revised Statutes as follows:

Cash on Hand	\$ 20.00
Amt. in fin. inst.	\$ 40.00
Security deposits	\$ 300.00
Books, pict., etc.	\$ 100.00
Personal costume jewelry	\$ 50.00
Firearms, sports, equip.	\$ 50.00
TRW claim	\$ 840.00
Office equipment	\$ 50.00
1978 Dodge Van	\$ 150.00
1981 Chevy Cutaway	\$ 900.00

Filing no. 13, Amended Schedule C. The 401(k) plan from the first Schedule C was listed under a different exemption, and since the plan is qualified under that exemption, it is no longer important to the issue in this Order. However, the debtor omitted the tax return money from the amended schedule altogether because the debtor received and spent the money, which was \$ 220.00, after preparation fees were paid, before the amended schedule was filed. The debtor also noted that the \$840.00 to be received on the TRW claim would include, in addition to \$840.00, amounts accruing after date of filing.

The trustee objected to the amended schedule. The trustee asserted that the debtor had no basis upon which to decrease the fair market value of the automobiles and the costume jewelry, that the tax refund should go to the estate, and that the \$840.00 claimed as exempt is not an accurate dollar figure because the trustee has been offered a amount in excess of \$2,500 to settle that lawsuit.

The debtor resisted the trustee's objections. The debtor asserted that the lower fair market value for the automobiles and the costume jewelry reflects the fact that the fair market values on the first schedules were inflated because the debtor did not believe that his exemptions pursuant to Section 25-1552 of the Nebraska Revised Statutes would approach \$2,500.00, and thus, he overstated the values so he could reach \$2,500.00 in the schedules. The debtor next asserted that the tax refund should be disregarded altogether because the money is gone. Finally, the debtor asserted that on the date of filing the petition, the settlement offer on the table was \$500.00, and therefore, the fair market value of the lawsuit in the bankruptcy should be \$500.00. The debtor believed that any value in excess of \$500.00 was due to the efforts of the debtor in prosecuting this suit, and the value should accrue to the debtor's benefit because of his efforts.

Discussion and Decision

The trustee's objection to the exemptions claimed by the debtor under Section 25-1552 of the Nebraska Revised Statutes is granted, and the debtor's resistance is denied without prejudice.

Section 522(1) of the Bankruptcy Code states:

The debtor shall file a list of property that the debtor claims as exempt under subsection (b) of this section.... Unless a party in interest objects, the property claimed as exempt on such list is exempt.

11 U.S.C. § 522(1). Pursuant to Section 522(b)(2)(A), Nebraska law determines what property is deemed exempt for bankruptcy purposes. The Nebraska exemption statute that is at issue in this case is Section 25-1552, which states:

All persons who have neither lands, town lots, or houses subject to exemptions as a homestead, under the laws of this state, shall have exempt from forced sale on execution the sum of twenty-five hundred dollars in personal property, except wages.

Neb. Rev. Stat. § 25-1552.

The debtor's amended Schedule C valued the van, the cutaway, and the costume jewelry at a significantly lower fair market value than the original Schedule C. The debtor's explanation was that the fair market values contained in the original Schedule C were inflated. However, when the debtor filed the Schedule, he signed a statement under the penalty of perjury that the information contained in the schedule was accurate, as required under Fed. Bankr. R. 1008. Even though it is common practice to list a fair market value in the schedules that is based upon the best judgment of the debtor and not on a true appraisal, such a practice is not sanctioned by the bankruptcy code, and therefore, if the schedules need to be amended, debtors may not unilaterally file amendments without sufficient explanations.

If the debtor would like to change the fair market value of the exemptions listed in Schedule C, the debtor should submit an appraisal or other evidence to confirm the amended fair market value. It is too suspicious when a debtor lists, under penalty of perjury, one fair market value, but after an interested party objects, amends the list to bring the property values within statutory limits. For this reason, the debtor's resistance was denied without prejudice, and the debtor may raise this issue again with proper evidence of the fair market values of the automobiles

and jewelry in a future motion. However, the fair market values which apply to the automobiles and the costume jewelry are the values listed in the original Schedule C.

The tax return that the debtor received must be listed as exempt property. The value of the tax return was originally listed as "unknown" in Schedule C, and the amended Schedule C did not list the tax return. After preparation fees were paid, the debtor stated that he received a return of \$220.00 after fees and that he has already spent the refund. The fact that the debtor has already spent the tax refund and extinguished a portion of his exempted property does not give the debtor permission to replace the spent exempted property with new property. It is clear from the debtor's actions that he regarded the tax return as his own property and not as property of the estate. Therefore, the debtor must recognize the \$220.00 as a portion of his \$2,500.00 exemption.

The last objection by the trustee which is sustained is that the debtor may not exempt the value of the lawsuit it has pending against TRW. Under the debtor's theory, the fair market value of the lawsuit was \$500.00 on the date of the petition, and therefore, the debtor should have the whole lawsuit exempted at the value of \$500.00. In the amended Schedule C, the debtor listed the fair market value at \$840.00, but gave no explanation for that value, except that when added to the other exemptions, the total is a perfect \$2,500.00.

The debtor's position is rejected for several reasons. First, the original Schedule C listed the lawsuit as "unknown," but the amended Schedule C listed the lawsuit value at \$840.00. \$500.00 has never been scheduled as the fair market value of the law suit. Therefore, from a technical standpoint, there is no reason to accept the \$500.00 number as accurate.

From a legal standpoint, the debtor's assertion that \$500.00 is the fair market value has to be incorrect. The debtor states that \$500.00 was the last offer of settlement that he received before filing bankruptcy. If \$500.00 were truly the fair market value, the debtor would have accepted the settlement, which he did not do. Therefore, the fair market value must be greater than \$500.00.

The trustee asserted that in his discussions with the defendant to the suit, the defendant has discussed a potential settlement in excess of \$2,500. The debtor does not dispute that the fair market value has gone up, but the debtor believes that it has gone up because of his efforts. However, the debtor has not engaged in any conduct which could have increased the value of this lawsuit. The debtor stated that he has complied with the defendant's requests for discovery by producing medical records, but compliance with discovery requests does not increase the fair market value of the lawsuit because the actual value of the cause

of action is no more than it was before discovery was initiated.

The value of the lawsuit will remain "unknown." To the extent that the debtor's scheduled exemptions pursuant to Section 25-1552 under the Nebraska Revised Statutes do not add up to \$2,500, the debtor may claim the remaining dollar amount from the lawsuit, if there is any settlement or award in that case.

The debtor's Schedule C exemptions pursuant Section 25-1552 of the Nebraska Revised Statutes currently consists of the following exemptions:

Cash on hand	\$ 20.00
Amt. in fin. inst.	\$ 40.00
Security deposit	\$ 300.00
Books, pict., etc.	\$ 100.00
Personal costume jewelry	\$ 150.00
Firearms, sports equip.	\$ 50.00
Office equipment	\$ 50.00
Fed. and St. tax return	\$ 220.00
1978 Dodge Van	\$ 400.00
1981 Chevy cutaway	\$1,100.00
<u>TRW claim: amount not to exceed --</u>	<u>\$ 70.00</u>
Total	\$2,500.00

Since the trustee's objections are granted without prejudice to the debtor, the debtor may file another amendment to Schedule C in accordance with this Order.

DATED: August 5, 1994.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:

*STALNAKER, THOMAS 393-2374

Copy mailed by the Court to:

United States Trustee
Radley Clemens, 4780 S. 131 St., Suite 1, Omaha, NE 68137

Movant (*) is responsible for giving notice of this journal entry to all other parties (that are not listed above) if required by rule or statute.