

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
KEVIN & BONNIE GRANT-LEANNA,) CASE NO. BK96-80908
) A
DEBTOR(S)) CH. 7
Filing No. 7, 9

MEMORANDUM OPINION

Hearing was held on Trustee's objection to claim of exemption. Appearances: Mary Powers for the Debtor and Thomas Stalnaker for Trustee. 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

Kevin Grant-Leanna (Kevin), a debtor in this Chapter 7 case, is employed by the Omaha Public Power District (the District), a Nebraska political subdivision. The District provides a deferred compensation plan for its employees which is qualified under 26 U.S.C. § 457 (the Plan), and Kevin is a participant in the Plan. On the date of the petition, the Plan had accumulated approximately \$32,000 in an account for the benefit of the debtor.

That amount was claimed as exempt, and the Chapter 7 Trustee, Thomas Stalnaker, filed an objection to the claim of exemption. The debtors resisted the Trustee's objection, and then claimed that the Plan was not property of the estate under the holding of the United States Supreme Court in Patterson v. Shumate, 504 U.S. 753, 112 S. Ct. 2242, 119 L. Ed. 2d 519 (1992).

The debtors have since stipulated that they may not claim the interest in the Plan as exempt if it is determined to be property of the estate. Therefore, the sole issue presented is whether the Plan is property of the estate.

Decision

The Plan is property of the estate pursuant to 11 U.S.C. § 541(a) and is not excluded from the estate by virtue of 11 U.S.C. § 541(c)(2) because the Plan is not a trust.

Discussion

Section 541(a)(1) provides:

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

11 U.S.C. § 541(a)(1). Property of the estate includes not only property that the debtor owned at the time of filing, but also property in which the debtor had an interest, even if that interest is contingent and not subject to possession until some future time. In re Carousel Int'l Corp., 89 F.3d 359 (7th Cir. 1996); Rau v. Ryerson (In re Ryerson), 739 F.2d 1423 (9th Cir. 1984).

The Plan provides in section 5.3 that:

All amounts of Compensation deferred under sections 4.1 and 4.2, all property and rights purchased with such amounts, and all income attributable to such amounts, property, or rights shall remain (until made available to Participants or Beneficiaries) solely the property and rights of the District (without being restricted to the provision of benefits under the Plan), subject only to the claims of the District's general creditors.

(emphasis supplied). According to section 5.2 of the Plan, a Plan "participant and any successor in interest to the Participant shall be and remain simply a general creditor of the District with respect to the Compensation deferred under the Plan in the same manner as any other creditor who has a

general claim for an unpaid liability." Plan participants, therefore, have at a minimum a contingent interest in the deferred compensation, and that interest is property of the estate pursuant to 11 U.S.C. § 541(a)(1). See, Sicherman v. Ohio Public Employees Deferred Compensation Program (In re Leadbetter), 992 F.2d 1216 (Table), 1993 WL 141068 (6th Cir. Apr. 30, 1993).

Having concluded that Kevin's interest in the Plan is included within the definition of property of the estate, the question remains whether it is nevertheless excluded from the estate by operation of § 541(c)(2).

Section 541(c)(2) provides that "[a] restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title." 11 U.S.C. § 541(c)(2). In Patterson v. Shumate, 504 U.S. 753, 758, 112 S. Ct. 2242, 2246, 119 L. Ed. 2d 519 (1992), the United States Supreme Court held that property is excluded from the bankruptcy estate by operation of § 541(c)(2) when three statutory requirements are met: (1) the debtor has a beneficial interest in a trust; (2) there is a restriction on the transfer of the beneficial interest of the debtor in the trust; and (3) the restriction is enforceable under nonbankruptcy law. See, In re Fink, 153 B.R. 883, 885 (Bankr. D. Neb. 1993).

Section 541(c)(2) is inapplicable to Kevin's interest in the Plan, and thus does not exclude it from the bankruptcy estate, because the Plan is not a trust. See, Leadbetter, 1993 WL 141068, at *3; Walsh v. Commonwealth of Pennsylvania, Dept. of Public Welfare (In re Kingsley), 181 B.R. 225, 232 (Bankr. W.D. Penn. 1995); Hannan v. Public Employees Benefit Services Corp. (In re Pedersen), 155 B.R. 750, 757-58 (Bankr. S.D. Iowa 1993). But see, In re Wheat, 149 B.R. 1003 (Bankr. S.D. Fla. 1992) (Holding that a deferred compensation plan is not property of the estate, but not discussing the trust element of Shumate and 11 U.S.C. § 541(c)(2).) "By definition, a trust exists when one party, the trustee, holds equitable title to the corpus, while another party, the beneficiary, holds legal title in the corpus." Pedersen, 155 B.R. at 757.

In this case, the Plan does not provide for a division of title, but rather specifically states that the deferred

compensation and other property in the Plan is solely the property of the District and that participants, such as Kevin, are merely general creditors of the District.

The debtors acknowledge that the Plan is not an "express trust," but argue that the Plan is a "resulting trust." A resulting trust is "one raised by implication of law and presumed always to have been contemplated by the parties, the intention as to which is to be found in the nature of their transaction, but not expressed in deed or instrument of conveyance." Brtek v. Cihal, 245 Neb. 756, 773, 515 N.W.2d 628, 639 (1994). However, it seems clear from the specific language utilized in the Plan that a trust relationship was not contemplated by the parties, but rather the relationship contemplated was one of debtor and creditor.

Therefore, Kevin's interest in the Plan is not excepted from the definition of property of the estate by § 541(c)(2), and the Trustee succeeds to his interest. However, what that interest is requires some further discussion.

The Trustee has succeeded to Kevin's interest in the Plan, and, accordingly, has no more rights to the funds than does Kevin. The Trustee, like Kevin, has the right to receive the deferred compensation upon the occurrence of one of three conditions precedent, i.e. death, termination of employment, or unforeseeable emergency. However, the trustee does not have the right to receive the deferred compensation immediately, because Kevin has no such right.

Two other bankruptcy courts have held that the filing of bankruptcy and a trustee's succession to the debtor's interest in a deferred compensation plan amount to an unforeseeable emergency, see Kingsley, 181 B.R. at 236; Scott v. Council, 122 B.R. 64, 67-68 (Bankr. S.D. Ohio 1990). That conclusion, although somewhat logical from the point of view of the creditors, is not compelling. The "unforeseeable emergency" clause in the Plan provides in part as follows:

An unforeseeable emergency is severe financial hardship to a Participant resulting from a sudden and unexpected illness or accident of the Participant . . . , loss of the Participant's property due to casualty, or other similar extraordinary and unforeseeable circumstances arising as a result of events beyond the

Participant's control. The circumstances that will constitute an unforeseeable emergency will depend upon the facts of each case but, in any case, payment may not be made to the extent that the hardship is or may be relieved--

. . .

(2) by liquidation of the Participant's assets, to the extent the liquidation of such assets would not itself cause severe financial hardship . . .

Prior to filing bankruptcy, Kevin petitioned for benefits under the Plan because of an unforeseeable emergency, and the Plan Administrator declined the request. Neither the mere act of filing bankruptcy nor the legally resulting succession in interest by a bankruptcy trustee are listed in the Plan as "unforeseeable emergencies" and there is no reason to give a Chapter 7 trustee the power to override the Plan's contractual provisions or the Plan Administrator's discretion. Cf. Carousel, 89 F.3d at 362 ("A debtor's interest in a portion of property does not subject the entire property to § 541. Nor does a debtor's claim to property mean that the entire property is part of the bankruptcy estate . . . The estate's property does not include the thing to which it lays claim until the matter is adjudicated or resolved by the parties.")

Therefore, the Trustee succeeds to Kevin's interest in the Plan, but that interest is only the present value of Kevin's right to payment on the occurrence of one of the Plan's conditions precedent.

Separate journal entry to be filed.

DATED: April 23, 1997.

BY THE COURT:

/s/ Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:

Mary Powers 498-0339 (11)

Thomas Stalnaker 393-2374 (12)

Copies mailed by the Court to:

United States Trustee

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.

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FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)	
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KEVIN & BONNIE GRANT-LEANNA,)	CASE NO. BK96-80908
)	A
<u>DEBTOR(S)</u>)	CH. 7
)	Filing No. 7, 9
Plaintiff(s))	
vs.)	<u>JOURNAL ENTRY</u>
)	DATE: April 23, 1997
<u>Defendant(s)</u>)	HEARING DATE:

Before a United States Bankruptcy Judge for the District of Nebraska regarding Trustee's objection to claim of exemption.

APPEARANCES

Mary Powers, Attorney for debtor
Thomas Stalnaker, Trustee

IT IS ORDERED:

The Plan is property of the estate pursuant to 11 U.S.C. § 541(a) and is not excluded from the estate by virtue of 11 U.S.C. § 541(c)(2) because the Plan is not a trust. Trustee objection sustained. See memorandum entered this date.

BY THE COURT:

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

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