

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)

ARTHUR W. PENSYL,)

DEBTOR)

CASE NO. BK95-81225

CH. 7

Filing No. 10, 14, 21

MEMORANDUM

Hearing was held on January 29, 1996, on an Objection to Claim of Exemption filed by the Omaha City Employees Federal Credit Union. Appearances: Bruce Abrahamson for the debtor and Donald Roberts for Omaha City Employees Federal Credit Union. 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, Arthur W. Pensyl, filed a petition for Chapter 7 bankruptcy relief on August 4, 1995. For the past ten years, the debtor has been employed by the City of Omaha. In his bankruptcy schedules, the debtor listed his pension plan with the City of Omaha as personal property, but declared the pension plan as exempt under NEB. REV. STAT. § 25-1563.01 (Reissue 1989).

A creditor in this case, the Omaha City Employees Federal Credit Union (the creditor), loaned money to the debtor in 1992 and 1993, for a car loan and a personal loan respectively. In exchange, the debtor granted the creditor a security interest in the debtor's savings account at the credit union. The debtor also granted the creditor a power of attorney over the future income from the debtor's pension plan. The power of attorney provided that after the debtor terminated his employment with the City, the creditor had the right to have the payments from the pension plan deposited into the debtor's savings account, and the right to offset any outstanding loan with the proceeds in the savings account. The creditor alleges that under Federal Credit Union laws, the creditor has a lien against the debtor's savings account to the extent of any outstanding loan and a right through the power of attorney to transfer the pension proceeds into that account, where the lien will attach, notwithstanding any state law to the contrary.

At this time, the debtor is still employed by Omaha and has not begun to receive any retirement funds from his pension plan. However, the creditor has objected to the exemption claimed by the debtor in the retirement funds and takes the position that its lien in the future retirement proceeds of the debtor, through the power of attorney, is not avoidable.

Discussion and Decision

The pension plan is not property of the estate under 11 U.S.C. § 541(c)(2), and therefore, this court does not have jurisdiction over the avoidability of the creditor's lien in the debtor's future retirement proceeds. Section 541(c)(2) provides that certain beneficial interests of the debtor will not become property of the bankruptcy estate:

A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable under this title.

11 U.S.C. § 541(c)(2).

In Patterson v. Shumate, the Supreme Court held that a pension plan which contained an enforceable anti-alienation provision satisfied the enforceable transfer restriction under Section 541(c)(2). 504 U.S. 753, 112 S. Ct. 2242, 2247-48, 119 L. Ed. 2d 519 (1992). Unlike the pension plan in Patterson, which was ERISA-qualified, the debtor's pension plan is not ERISA-qualified because government pension plans are excluded from the applicability of ERISA. 29 U.S.C. § 1003(b)(1). This difference is not significant. Patterson held that the "restriction on the transfer" clause in Section 541(c)(2) was satisfied because the plan in that case contained an anti-alienation clause, not because it was ERISA-qualified:

[W]e next determine whether the antialienation provision contained in the ERISA-qualified plan at issue here satisfies the literal terms of § 541(c)(2).

Section 206(d)(1) of ERISA, which states that "[e]ach pension plan shall provide that benefit provided under the plan may not be assigned or alienated," 29 U.S.C. § 1056(d)(1), clearly imposes a "restriction on the transfer" of a debtor's "beneficial interest" in the trust.

Id. at 2247. The Supreme Court also said that the scope of Section 541(c)(2) is not limited to traditional spendthrift trusts under state law, but also extends to other laws which impose restrictions on transferability. Id. at 2248; see also In re Holst, 1996 WL 44615 (Bankr. N.D. Iowa 1996) (holding that an ERISA-qualified pension plan does not have to meet the requirements of a traditional spendthrift trust under state law to be excluded from the bankruptcy estate pursuant to § 541(c)(2)).

This interpretation of Patterson is supported by Eighth Circuit case law. In Whetzal v. Alderson, the Eighth Circuit held that federal civil service benefits, which are also excepted from ERISA, are not property of the estate under Section 541(c)(2). 32 F.3d 1302, 1304-05. In Whetzal, the debtor had a right to opt out of the plan in exchange for a lump-sum payment after terminating his employment if he was not otherwise entitled to an annuity. 32 F.3d at 1303-04. However, the court found that the broad language of the civil service statute which restricted the transfer of the debtor's beneficial interest also encompassed the lump-sum payment, and therefore, the civil service pension plan was excluded as property of the bankruptcy estate under Section 541(c)(2). Id. at 1304.

Patterson provided that "applicable nonbankruptcy law" includes "any relevant nonbankruptcy law." 112 S. Ct. at 2247. The debtor's pension plan is subject to the Omaha Municipal Code, and the court finds that the Omaha Municipal Code qualifies as relevant nonbankruptcy law.

If the debtor's pension plan contains an enforceable anti-alienation clause similar in scope to the anti-alienation statute in Patterson, the pension plan will be excluded from the bankruptcy estate pursuant to Section 541(c)(2). On the subject of the city pension plan, the Omaha Municipal Code provides:

The right of a member or retiree to a service retirement pension, the return of accumulated contributions, or any other right accrued or accruing to any member, retiree or beneficiary under the provisions of this system shall be unassignable and shall not be subject to sale, execution, garnishment, or attachment.

OMAHA MUNICIPAL CODE § 22-44 (1993). The language restricting the alienability of the debtor's plan is similar in effect to the language contained in ERISA.

In the pension plan, there are two opportunities to obtain a lump sum payment. The first occurs when the beneficiary dies and

his or her spouse or minor children have a vested right to pension benefits. At that time, the spouse and children may become entitled to a lump-sum payment. See OMAHA MUNICIPAL CODE § 22-37 (1993). The second occurs when the beneficiary terminates his or her employment before qualifying for the service retirement pension. See OMAHA MUNICIPAL CODE § 22-39 (1993). The first contingency does not disqualify the anti-alienation clause from the applicability of Section 541(c)(2) because the restriction on the beneficiary's interest is not impacted. The second contingency is similar to the federal civil service statute in Whetzal. The anti-alienation clause in the Omaha Municipal Code expressly applies to "accumulated contributions." See OMAHA MUNICIPAL CODE § 22-44 (1993). Therefore, because the lump-sum payment is within the scope of the anti-alienation clause, the restriction on the beneficiary's interest is still within the scope of Section 541(c)(2).

The restriction on transfer is made enforceable through Section 22-46 of the Omaha Municipal Code, which grants the trustees of the plan the right to enforce the provisions of the pension plan. OMAHA MUNICIPAL CODE § 22-46 (1993).

Conclusion

The pension plan is not property of the bankruptcy estate. The pension plan contains an enforceable restriction on the transfer of the debtor's beneficial interest, and such restriction prevents the pension plan from passing into the bankruptcy estate. Therefore, this court does not have jurisdiction over the avoidability of the lien of the creditor or the right of the debtor to declare the pension plan as exempt.

Separate journal entry to be filed.

DATED: March 5, 1996

BY THE COURT:

Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:

ABRAHAMSON, BRUCE	493-7005
STALNAKER, THOMAS	393-2374
ROBERTS, DONALD	346-8566

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.

