

9-30-06

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

IN THE MATTER OF : BANKRUPTCY CASE  
: NO. 06-62721-MGD  
LAURA BUCHANAN PRICE, :  
: IN PROCEEDINGS UNDER  
DEBTOR. : CHAPTER 7 OF THE  
: BANKRUPTCY CODE

**ORDER**

This matter is before the Court on the Chapter 7 Trustee's Objection to Debtor's Exemptions ("Objection") (Docket No. 12) and Motion for Turnover by Debtor of Property of the Estate ("Motion") (Docket No. 13). An evidentiary hearing was held on June 13, 2006, and the parties submitted post-hearing briefs. Based upon the record in this case and the evidence and arguments presented, the Trustee's Objection is **SUSTAINED** and Motion is **GRANTED**.

Debtor filed her Chapter 7 case on March 9, 2006. On Schedule C, Debtor claimed a checking account with Bank of America with a balance of \$3,321 and "Elephant Crystal" valued at \$8,000 as exempt under O.C.G.A. § 44-13-100(b)(6). The Trustee contends that Debtor's claim of exemption exceeds the amount permitted under Georgia law (\$5,600) and therefore Debtor is required to deliver the property to the Trustee under § 542 of the Bankruptcy Code. In response to the Trustee's Objection, on the day of the hearing, Debtor amended Schedule C to claim as exempt under O.C.G.A. § 44-13-100(b)(6) only the checking account with Bank of America. Additionally, Debtor contends that since she is no longer in possession of the funds in the checking account or the crystal elephant figurines she cannot be subject to a turnover order. Debtor further contends that she is not liable to the Trustee for the value of the property.

Debtor testified that the \$3,321 in the Bank of America checking account represented her federal tax refund. Debtor further testified that the balance in the Bank of America checking account as of the hearing date was \$90. She testified that she spent the money on food, utilities, child care and other household and living expenses.

At the section 341 meeting of creditors on April 17, 2006, Debtor had testified that the crystal elephant figurines were in storage. At the hearing on June 13, 2006, Debtor stated that she moved into her boyfriend's house on Orange Drive in February or March 2006. Prior to moving to Orange Drive, she resided with her sister at 29 Ann Marie Lane. Debtor further testified that she moved the crystal elephant figurines from storage to the house at 29 Ann Marie Lane, and thereafter to the house on Orange Drive, and that the crystal elephant figurines were destroyed in June 2006 when the house on Orange Drive was burglarized. Despite being valued by Debtor at \$8,000,<sup>1</sup> the crystal elephant figurines were not insured.

Upon the commencement of a bankruptcy case all legal or equitable interests of the debtor in property become property of the bankruptcy estate. 11 U.S.C. § 541(a). Thereafter the debtor may exempt certain property from the bankruptcy estate under 11 U.S.C. § 522.<sup>2</sup> A party in interest has 30 days after the section 341 meeting of creditors to object to the debtor's claim of exempt property. Fed. R. Bankr. P. 4003(b)(1). "Unless a party in interest objects, the property claimed as exempt . . . is exempt." 11 U.S.C. § 522(l). Property claimed as exempt, however, remains property of the estate until the expiration of 30 days after the filing of debtor's claim of exemption with no objection by a party in interest or until the court makes a determination that the property is exempt.<sup>3</sup>

---

<sup>1</sup>Debtor testified at the hearing that she experienced two break-ins in 2005, at a different address, and some of the elephant crystal was destroyed at that time. Debtor further testified that the remaining crystal elephant figurines were worth approximately \$8,000. There is no other evidence of their value and no opportunity for another valuation. Therefore, the Court must rely on Debtor's valuation.

<sup>2</sup>Section 522(d) sets forth the type of property that a debtor may exempt. Section 522(b), however, allows states to opt out of the federal exemptions and create their own. Georgia has elected to establish its own list of exemptions under O.C.G.A. § 44-13-100(b).

<sup>3</sup>See *Owen v. Owen*, 500 U.S. 305, 308, 111 S. Ct. 1833, 114 L. Ed. 2d 350 (1991) ("No property can be exempted (and thereby immunized), however, unless it first falls *within* the bankruptcy estate. Section 522(b) provides that the debtor may exempt certain property from property of the estate; obviously, then, an interest that is not possessed by the estate cannot be exempted."); *Gamble v. Brown (In re Gamble)*, 168 F.3d 442 (11<sup>th</sup> Cir. 1999) ("Once the property is removed from the estate [through exemption], the debtor may use it as his own."); *In*

Thus, Debtor's cash and elephant crystal remained property of the estate because the Trustee timely objected to the exemption claim.

Federal Rule of Bankruptcy Procedure 1009(a) permits a debtor to amend her list of exemptions on Schedule C at anytime before the case is closed. The bankruptcy court, however, may review amendments to exemptions with an equitable gloss. *Pope v. Clark (In re Clark)*, 274 B.R. 127, 136 (Bankr. W.D. Pa. 2002) (citing *In re Cudeyro*, 213 B.R. 910, 918 (Bankr. E.D. Pa. 1997)). The court has discretion to disallow the amendment based on the debtor's bad faith or where prejudice to creditors would occur if the exemption was allowed. *E.g., In re Doan*, 672 F.2d 831, 833 (11<sup>th</sup> Cir. 1982). Although mere delay in filing an amendment is not sufficient to establish prejudice to creditors, where the parties would have taken different positions had the exemption been claimed earlier, the interests of the parties are detrimentally affected by the timing of the amendment, or the amendment impairs a trustee in the diligent administration of the estate, unfair prejudice to creditors cuts against allowing the amendment. *E.g., In re Talmo*, 185 B.R. 637 (Bankr. S.D. Fla. 1995).

The Trustee relied on Debtor's representations that the crystal elephant figurines were being kept in storage and Debtor did not inform the Trustee otherwise. The Trustee had no reason to suspect that the property was not being preserved for the benefit of the estate. A debtor in

---

*re Robertson*, 105 B.R. 440 (Bankr. N.D. Ill. 1989) ("The effect of the automatic allowance of a claim of exemption due to expiration of the 30 day period is, under well settled case law, to "revest" the property in the debtor and end its status as "property of the estate."); *see also In re Grossman*, 80 B.R. 311, 314 (Bankr. E.D. Pa. 1987); *In re Hahn*, 60 B.R. 69, 73 (Bankr. D. Minn. 1985) ("Once a debtor's claim of exemption to property has been allowed by the running of the period for objection to the claim of exemptions under Bankr.R. 4003(b), the property revests in the debtor and is no longer property of the estate"); *In re Berry*, 11 B.R. 886, 890 (Bankr. W.D. Pa. 1981) ("[I]f property is claimed as exempt initially it becomes property of the estate, but revests in the debtor upon failure by any party to object to the exemption within a specified period of time."); *In re Cruseturner*, 8 B.R. 581, 590 (Bankr. D. Utah 1981); 3 Collier on Bankruptcy ¶ 522.26, pp. 522-82 to 522-85 (15th ed. 1989).

possession of property of the estate has a duty to preserve that property for the benefit of the estate.<sup>4</sup> By amending her claim of exemption to exempt the entire value of the funds in the Bank of America account, Debtor is seeking to gain an economic advantage at the expense of her creditors. The creditors in this case should not be required to bear the loss of property of the estate that was in the sole possession and control of Debtor. To allow Debtor to amend her claim of exemption after the Trustee has filed an objection and after the property, which she now claims is not exempt, has been destroyed would clearly be inequitable and would hinder the diligent administration of the bankruptcy estate by the Trustee. Therefore, the Court concludes that Debtor's amendment to Schedule C is disallowed. Further, Trustee's Objection to Debtor's claims of exemption is granted to the extent that Debtor's claim exceeds the limits provided by Georgia law. Debtor, however, will be permitted to exempt \$5,600, in value for the crystal elephant figurines in accordance with Georgia law.

The Trustee further seeks turnover of the property from Debtor. Debtor contends that present possession is a prerequisite to a turnover claim and because she is no longer in possession of the crystal elephant figurines or the funds in the Bank of America account, she cannot be compelled to comply with a turnover order. This is an issue upon which there has been much debate. Section 542(a) requires "an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title [to] deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the

---

<sup>4</sup> Included in the list of duties of the debtor under section 521(a)(3) is the duty to cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties. A chapter 7 trustee's duties include the collection and liquidation of assets for the benefit of creditors. 11 U.S.C. § 704. Additionally, in accordance with section 521(a)(4) the debtor has a duty to surrender all property of the estate to the trustee. Read together, these provisions evidence the debtor's duty to preserve property of the estate.

estate.” 11 U.S.C. § 542(a).<sup>5</sup> Some courts, relying on the U.S. Supreme Court’s decision in *Maggio v. Zeitz*, 333 U.S. 56, 68 S.Ct. 401, 92 L.Ed. 476 (1948) in which the Court applied the law under the Bankruptcy Act, have held that present possession is required for relief under section 542(a). *E.g.*, *Yaquinto v. Greer*, 81 B.R. 870, 878 (N.D. Tex. 1988); *In re Gailey, Inc.*, 119 B.R. 504, 514 (Bankr. W.D. Pa. 1990); *In re Bell & Beckwith*, 44 B.R. 659, 660 (Bankr. N.D. Ohio 1984). More recently, however, a majority of courts have held that present possession is no longer a complete defense to liability under section 542(a), which permits the trustee to recover from an entity that had possession of estate property at any time “during the case” and allows the trustee to recover “the value of such property.” *E.g.*, *Boyer v. Davis (In re U.S.A. Diversified Prods.)*, 193 B.R. 868 (Bankr. N.D. Ind. 1995); *Thomas v. Burke*, 150 B.R. 660, 662-63 (Bankr. E.D. Tex. 1993); *In re Borchert*, 143 B.R. 917, 919 (Bankr. D.N.D. 1992).

An action to recover money or property generally requires an adversary proceeding. FED.R.BANKR.P. 7001(1). Rule 7001, however, provides an exception, if the proceeding is brought by the trustee to compel the debtor to deliver property to the trustee. *Id.* A turnover action by motion is appropriate, however, only when the debtor has possession of the property of the estate. *Hill v. Muniz (In re Muniz)*, 320 B.R. 697, 699-70 (Bankr. D. Colo. 2005); *In re Gentry*, 275 B.R. 747 (Bankr. W.D. Va. 2001); *Boyer v. Davis (In re U.S.A. Diversified Prods., Inc.)*, 193 B.R. 868 (Bankr. N.D. Ind. 1995). Generally, when the property sought to be turned over is money, a debtor can be ordered to turn over an equivalent amount of cash. *E.g.*, *In re Gentry*, 275 B.R. 747, 751 (Bankr. W.D. Va. 2001). Because of the fungible nature of money, it is not necessary that the cash turned over to the trustee pursuant to the turnover order be the identical cash sought by the trustee in her motion. *Id.* However, when the debtor no longer has possession of the property or its value, the appropriate remedy available to the trustee is a money judgment, which can be obtained only through an adversary proceeding. *In re Gentry*, 275 B.R. at 751, 752; *Boyer*, 193 B.R. at 879.

---

<sup>5</sup> The debtor is an entity for the purposes of section 542(a). *In re Gentry*, 275 B.R. 747 (Bankr. W.D. Va. 2001).

Therefore, the Court concludes that the Trustee's Motion is granted to the extent that it seeks recovery of the \$3,321 in the Bank of America account. The Trustee, however, must bring an adversary proceeding to recover a money judgment for the non-exempt value of the crystal elephant figurines.

Accordingly, it is

**ORDERED** that the Trustee's Objection is **SUSTAINED**.

**IT IS FURTHER ORDERED** that Debtor's Amended Claim of Exemption is **DISALLOWED**.

Debtor is further **ORDERED** to deliver \$3,321 to the Trustee.

**IT IS SO ORDERED**, this 20<sup>th</sup> day of September, 2006.

*Mary Grace Diehl*  
\_\_\_\_\_  
MARY GRACE DIEHL  
UNITED STATES BANKRUPTCY JUDGE