

5-10-10

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	:	CASE NO. 09-89133-JB
	:	
LYNN ANN CELESTIN,	:	
	:	
Debtor.	:	
_____	:	CHAPTER 7
	:	
MARTHA MILLER, Chapter 7 Trustee,	:	
	:	
Movant,	:	CONTESTED MATTER
	:	
v.	:	
	:	
LYNN ANN CELESTIN,	:	
	:	
Respondent.	:	

ORDER

This Chapter 7 case is before the Court on the Chapter 7 Trustee’s objection to certain of debtor’s claimed exemptions (Docket No. 37). The Court held a hearing on the matter on March 17, 2010, at which the Trustee’s counsel, the Trustee and the debtor were present. At the hearing, the Trustee withdrew her objection to debtor’s claimed exemption in certain 529 accounts and presented a brief in support of her objection to debtor’s claimed exemption in accounts receivable from Styro Systems, Inc. (“Styro”) in the amount of \$70,000.00. These amounts are owed under a stock purchase agreement signed pre-petition between the debtor and Styro and a related non-compete agreement between the same parties. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B).

The Trustee contends the amounts owing under these agreements from Styro are property of the estate under § 541(a) of the Bankruptcy Code, and that there is no exemption under Georgia law that would allow Ms. Celestin to retain these funds. Since debtor was unrepresented by counsel and the Trustee presented his brief at the hearing, the Court gave debtor thirty (30) days to retain counsel and to respond formally to the Trustee's objections to exemptions. See Order entered March 23, 2010 (Docket No. 73). Debtor submitted a letter dated April 19, 2010 representing that she has been unable to retain counsel, in part because she has no funds with which to hire an attorney, as her prior attorney, Mr. Cornelison, has failed to return \$15,000.00 which he took as a retainer.

The Court understands that the debtor has had difficulty obtaining counsel, and on May 4, 2010, the Court entered an Order directing Mr. Cornelison to disgorge the retainer. That Order directed the Chapter 7 Trustee, upon receipt of the funds from Mr. Cornelison, to set aside \$7,500.00 of the \$15,000.00 retainer for debtor Lynn Celestin to use in retaining new counsel to represent her interests. However, given the applicable law on exemptions and what appear to be undisputed facts, it makes sense to provide the parties with a ruling on the Trustee's objections to the debtor's exemptions at this time. Should debtor retain counsel, counsel can file a proper motion should counsel determine that there are facts or law that would justify a different result.

The accounts receivable listed by debtor on Schedule C as exempt are comprised of two types of payments, both stemming from the sale of debtor's previous ownership interest in Styro. The first set of payments comes from the sale of debtor's stock

through a stock purchase agreement dated December 17, 2008. In exchange for her ownership interest, debtor received \$100,000.00 and a release of certain obligations she owed Styro. The stock purchase agreement also provided that Styro would pay debtor \$140,000.00 in monthly installments of \$6,204.89 over a two (2) year period from December 15, 2008 through November 15, 2010. Debtor originally filed a Chapter 11 petition on November 2, 2009, and the case was converted to a Chapter 7 case on January 27, 2010. The payments remaining due under the stock purchase agreement following the conversion, i.e. payments from January 27, 2010 through November 15, 2010, total \$62,048.90.

The second set of payments comes from a non-compete agreement. As an express condition of the sale, the stock purchase agreement obligated debtor to sign a non-compete agreement. Thus, debtor executed a non-compete agreement on December 17, 2008, the same day she signed the stock purchase agreement, whereby she agreed not to compete, solicit suppliers or solicit employees from Styro for two (2) years. The non-compete agreement called for Styro to pay debtor \$25,000.00 per year for two (2) years in eight quarterly payments of \$6,250.00 each. These payments began in December of 2008 and continue until September of 2010. Three post-petition quarterly payments have or will come due after debtor's case was converted to Chapter 7, and these payments total \$18,750.00.

The monthly payments owed by Styro to the debtor under the stock purchase agreement are property of the estate to be administered by the Trustee. "Property of the estate" is broadly defined and includes all legal and equitable interests of the debtor in

property at the commencement of the case. See 11 U.S.C. § 541(a)(1); *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204-205, 103 S. Ct. 2309, 76 L.Ed.2d 515 (1983). Debtor has an interest and a right to receive payments from the pre-petition sale of stock, and the right to receive these payments is property of the estate. 5 COLLIER ON BANKRUPTCY ¶ 541.08[4] (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev.).

Styro's post-petition payments under the non-compete agreement are also property of the estate. The only possible argument to the contrary is that the payments are from "services performed by an individual debtor after the commencement of the case" within the meaning of 11 U.S.C. § 541(a)(6) so as to be excluded from property of the estate.

Section 541(a)(6) provides as follows:

Section 541(a)(6). Property of the Estate.

(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: . . .

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

11 U.S.C. § 541(a)(6). Most courts have held that payments pursuant to a non-compete agreement are property of the estate, regardless of whether the payments are made or come due post-petition, because a payment for refraining from competing is not *performing* a service within the meaning of § 541(a)(6). Payments from non-compete agreements are viewed as cash flow stemming from a transaction rooted in a pre-petition sale of assets, and the reasoning in these cases is persuasive. See *e.g. Andrews v. The Riggs Nat'l Bank of*

Washington, D.C. (In re Andrews), 80 F.3d 906, 909-912 (4th Cir. 1996); *Johnson v. Taxel (In re Johnson)*, 178 B.R. 216, 219-221 (B.A.P. 9th Cir. 1995); *In re Alstad*, 265 B.R. 488, 490-491 (Bankr. M.D. Fla. 2001); *In re McDaniel*, 141 B.R. 438, 440 (Bankr. N.D. Fla. 1992); *but see In re Hammond*, 35 B.R. 219, 223 (Bankr. W.D. Okla. 1983). *Andrews* is particularly instructive as the Court analyzes the language of the statute, the statutory purpose and the purposeful distinction between a debtor's pre-petition and post-petition assets. In the case at bar, debtor's stock purchase agreement explicitly conditioned the sale of her ownership interest upon the execution of a non-compete agreement. The non-compete agreement was ancillary to and part of the sale of stock that occurred one year before debtor filed her bankruptcy petition. Accordingly, the payments derived from the non-compete agreement are property of the estate and are not covered by the exception in § 541(a)(6).

Debtor's rights to receive either set of payments from Styro are not exempt. The Bankruptcy Code allows a state to "opt out" of allowing its residents to take advantage of the federal exemptions and Georgia has done so. Accordingly, residents of Georgia filing bankruptcy petitions may claim only those exemptions allowable under Georgia law and non-bankruptcy federal law. The Georgia statute for exemptions for purposes of bankruptcy is found at O.C.G.A. § 44-13-100.

Schedule C requires a debtor to list property claimed as exempt, to specify the law providing for the claimed exemption, to value the claimed exemption and to include a current value of the property without deducting the exemption. The property at issue here is listed by debtor as "Accounts Receivable Styro Systems, Inc.", the debtor lists O.C.G.A.

§ 44-13-18 as the law providing for the exemption, and debtor values the exemptions at \$70,000.00. O.C.G.A. § 44-13-18 is not applicable in this bankruptcy, and debtor's reliance on this statute is misplaced.

Section 44-13-18 provides as follows:

44-13-18. Produce, rents, and profits, how disposed of.

All produce, rents, or profits arising from the property in this state which is exempted under this article shall be for the support of those persons allowed such exemption and shall be exempt from levy and sale except as otherwise provided in this article.

O.C.G.A. § 44-13-18. On its face, this statute does not apply to the Styro payments. In addition, O.C.G.A. § 44-13-18 is part of Article 1 of Chapter 13 of Title 44 of the Georgia Code, which contains Georgia's constitutional exemptions. Article 2 of Chapter 13 of Title 44 contains the statutory exemptions available to Georgia residents, including O.C.G.A. § 44-13-100, which provides that "[i]n lieu of the exemption provided under Code Section 44-13-1" a debtor in bankruptcy may claim as exempt certain categories of property. See O.C.G.A. § 44-13-100. Once debtor has claimed exemptions under O.C.G.A. § 44-13-100, debtor is expressly prohibited from claiming a constitutional exemption under Article 1, and this includes O.C.G.A. § 44-13-18. See O.C.G.A. § 44-13-21 ("No person who is allowed the exemptions under Code Section 44-13-100 shall take any benefit under this article [Article 1]."). In Schedule C, debtor claimed numerous exemptions under O.C.G.A. § 44-13-100, so even if O.C.G.A. § 44-13-18 otherwise applied to the property at issue, which it does not, as a constitutional exemption, O.C.G.A. § 44-13-18 would not be available to the debtor.

Further, the Styro payments do not fall under any specifically enumerated category under O.C.G.A. § 44-13-100. The payments are derived from debtor's legal rights under the stock purchase and non-compete agreements. A legal right to payment is not an articulated exemption, and can only fall under the wildcard exemption provision that enables a debtor to exempt "debtor's aggregate interest, not to exceed \$600.00 in value plus any unused amount of the exemption not to exceed \$5,000.00, provided under paragraph (1) of this subsection, in any property." O.C.G.A. § 44-13-100(a)(6); *see also generally* O.C.G.A. § 44-13-100. Debtor has already used her wildcard exemption by claiming \$5,500.00 in a checking account and \$100.00 in cash under O.C.G.A. § 44-13-100(a)(6).

In accordance with the above reasoning, the Court sustains the Trustee's objection to debtor's claim of exemption in Styro's post-conversion payments under the stock purchase agreement and the non-compete agreement.

It is so Ordered, this 10th day of May, 2010.



JOYCE BIHARY
UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF MAILING

A copy of the foregoing Order was mailed to the following:

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