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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

In re RICHARD CARSON PETERSON, Debtor.	CHAPTER 7 CASE NO. 03-65019-MGD
PAUL H. ANDERSON, JR., AS TRUSTEE, Plaintiff, v. RICHARD C. PETERSON and JULIA A. KENNEY, Defendants.	ADVERSARY PROCEEDING NO. 05-6520

ORDER DENYING CROSS-MOTIONS FOR
SUMMARY JUDGMENT AND DENYING DEFENDANTS'
MOTION TO AMEND ANSWER

This case is before the Court on cross-motions for summary judgment on the legal issue of whether vacation pay which has accrued pre-petition but which was not payable until the occurrence of an event which took place post-petition is property of the estate. Under the Bankruptcy Act of 1898, the answer to this question was short and clear. The Supreme Court held in *Lines v. Frederick*, 400 U.S. 18 (1970), that earned but unpaid vacation pay was not property of the estate under Section 70a(5). The enactment of the Bankruptcy Code of 1978 changed the result in *Lines v. Frederick* but did not leave as clear an answer to the underlying

question. Whether accrued vacation pay is property of the estate under 11 U.S.C. § 541 must be determined with reference to Georgia law. The undisputed facts presented in this case are insufficient for the court to determine whether property of the estate is involved and, therefore, both motions for summary judgment must be denied. For the reasons set forth below, Defendant's Motion to Amend Answer also is denied.

I. STATEMENT OF FACTS

Debtor Richard Carson Peterson ("Debtor") filed a Chapter 7 case on April 4, 2003. Paul H. Anderson, Jr. was subsequently appointed as Chapter 7 Trustee ("Trustee"). At the time the Chapter 7 was filed, Debtor was employed by CSC Consulting, Inc. ("CSC"), a subsidiary of Computer Sciences Corporation. As of that date, Debtor had the right to take accrued vacation which had a value of $18,404.90. Debtor's employment was terminated as of May 16, 2003 and Debtor and CSC entered into a Special Pay Agreement and General Release on May 12, 2003. The Agreement provided for a lump sum payment to Debtor in the amount of $62,893.74 contingent upon the execution of the Agreement and the return of all Company Information. The Agreement also provided: "Vacation will accrue in accordance with CSC Consulting's existing vacation accrual policy through the Termination Date, and all accrued, unused vacation will be paid out in the second regular payroll cycle following the final paycheck." The Debtor did not have a written employment contract and neither party submitted any evidence with respect to the written policy, if any, of CSC with respect to the payment for unused vacation pay upon termination of employment. Likewise neither party submitted any evidence with respect to the practice of the employer with regard to vacation or payment for unused vacation time upon the

termination of employment.

The Trustee initially filed a Report of No Distribution on June 3, 2003. The Debtor received his discharge and the case was closed on February 25, 2005. On March 25, 2005, the Trustee filed a Motion to Reopen Case which Motion was granted by Order Entered on April 7, 2005. The Trustee conducted 2004 examinations of the Debtor and of his former employer and, on November 15, 2005, the Trustee filed a Complaint for Turnover of Undisclosed Property of the Estate and named as Defendants, Debtor and Julia A. Kenney, Debtor's fiancee/partner. The Complaint sought recovery of $12,055.21, the net amount received by Debtor, for accrued but unused vacation pay related to services he performed for CSC prior to the filing of the bankruptcy case. Defendants filed an Answer and Counterclaim. Defendants claim that the vacation pay was not an asset of the estate at the time the case was filed because Debtor had no entitlement to take the vacation pay "unless he took paid leave time, resigned, was laid off from his employment or was otherwise terminated from his employment." (Answer, First Defense- Docket No. 9). Defendants filed a Counterclaim for violation of Rule 11 of the Federal Rules of Civil Procedure. For purposes of their Motion, Defendants have now abandoned that claim. (Defendant's Brief In Support of Motion for Summary Judgment, Section II.C.- Docket No. 16). Defendants filed their Motion for Summary Judgment and supporting papers (Docket No. 16) on April 7, 2006. The Trustee filed a Cross Motion for Summary Judgment on April 17, 2006 (Docket No. 17).

On April 20, 2006, Defendants filed an Amended Answer to the Complaint (Docket No. 22) and on May 16, 2006, filed a Motion to Amend Answer (Docket No. 27) after the Trustee brought to their attention that Rule 7015 did not permit an amendment to the Answer without

leave of court at that stage of the proceedings. Neither the original Answer nor the proposed Amended Answer is verified and its evidentiary value is therefore limited to any admissions that might be made. The Amended Answer attempts to change the basis of Defendants' defense to the contention that Defendants were not entitled to any payment for vacation leave prior to the execution of the termination agreement and that prior to that agreement (May 12, 2006), any payment for vacation leave was solely in the discretion of the employer. Defendants do not attempt to amend their Statement of Material Facts in which they concede that "Pursuant to his contract, Debtor was entitled to unused, accrued, vacation leave," but states that he was not permitted, pre-petition, to take additional salary in lieu of taking a vacation. (Defendants' Statement of Material Facts As To Which There Is No Genuine Issue For Determination By the Court (Docket No. 16), ¶¶ 4, 5).

II. SUMMARY JUDGMENT STANDARD

Pursuant to Bankruptcy Rule of Procedure, Rule 7056, incorporating Federal Rule of Civil Procedure Rule 56, the Court will grant summary judgment only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. In determining whether a genuine issue of material fact exists, the Court must view the evidence in the light most favorable to the nonmoving party. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Rosen v. Biscayne Yacht & Country Club, Inc.*, 766 F.2d 482, 484 (11th Cir. 1985).

III. LEGAL ANALYSIS

The Bankruptcy Code of 1978 substantially expanded the concept of "property of the

estate." Section 541(a)(1) provides that with certain limited exceptions, property of the estate is comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). Additionally, Section 541(a)(6) adds to the definition "[p]roceeds, 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). This breadth of coverage was a substantial change from the Section 70(a) of the Bankruptcy Act.

"The approach with respect to the creation of the estate is significantly different under the Code than it was under the Act. Section 70(a) of the Act is a statute of inclusion, whereas § 541(a) of the Code is a statute of exclusion. Section 70(a) creates the estate in bankruptcy under the Act and explicitly lists the property which will fall into the estate and the extent to which that property is includable within the estate. The definition of what is to be included in the estate under the Code, on the contrary, is extremely broad with only two exclusions . . . These provisions demonstrate that when Congress intended to exclude property from the estate, it carefully indicated this intention." *In re Ford*, 3 B.R. 559, 568-569 (Bankr. D. Md. 1980) (*en banc*). The fact that the Debtor's interest in property is subject to a contingency as of the date of the filing of the case does not mean that the interest is not property of the estate. *E.g.*, *In re Ryerson,* 739 F.2d 1423, 1425 (9th Cir. 1984). The legislative history of the Bankruptcy Code makes clear that Congress intended to include all legally recognizable interests although they may be contingent and not subject to possession until some future time. H.R. Rep. No. 595, 95th Cong., 1st Sess. 175-76 (1977), reprinted in 1978 U.S. Code Cong. And Ad. News 5963, 6136.

The statute thus makes clear that if a Chapter 7 debtor has a contingent right to receive

funds in the future, that contingent right belongs to the bankruptcy estate and if the contingency occurs post-petition, the funds received belong to the Chapter 7 Trustee, unless the entitlement of the debtor results from services performed by the debtor after the commencement of the case and thus are subject to the § 541(a)(6) exclusion. *E.g., In re Ryerson,* 739 F.2d at 1425-1426. The Trustee in this case seeks only that portion of the accrued vacation pay that is related to the pre-petition services of the Debtor so the § 541(a)(6) exclusion is not applicable here.

The specific issue of the inclusion of accrued vacation or sick pay in property of the estate was addressed under the Bankruptcy Act by the Supreme Court in *Lines v. Frederick*, 400 U.S. 18, 91 S. Ct. 113, 27 L. Ed. 2d 124 (1970) which held that the estate did not include accrued, but unpaid, vacation pay of the bankrupt. The legislative history of the Bankruptcy Code states that the broad concept of estate property adopted by the legislation specifically overruled the holding of *Lines v. Frederick*. H.R. Rep. No. 95-595, at 368.

While the scope of Section 541 is broad, the Debtor's interest in the property as of the petition date is determined with reference to state law. *Butner v. United States,* 440 U.S. 48, 99 S. Ct. 914, 59 L. Ed. 136 (1979); 5 *Collier on Bankruptcy* (15th Ed. Revised) ¶541.05 ("Section 541 provides the framework for determining the scope of the debtor's estate, and what property in which the debtor has an interest will be included within the estate. It does not, however, provide any rules for determining whether the Debtor has an interest in the property in the first instance. Determination of this issue requires resort to non-bankruptcy law.") Thus, in this case, the Court must consider whether the Debtor had an enforceable contingent right to vacation pay under Georgia law. Georgia law does not require employers to provide their employees with vacation, and there are no statutory provisions which regulate the scheduling or payment for

vacation time. 17 Ga. Jur. Employment and Labor § 3.37. A vacation plan offered by an employer and impliedly accepted by the employee by remaining in employment constitutes an enforceable contract. *See Fletcher v. Amax, Inc.*, 160 Ga. App. 692, 695, 288 S.E.2d 49, 51 (1981) (citing *Adams v. Hercules, Inc.*, 245 Ga. 464, 265 S.E.2d 781(1980)); *Hercules, Inc. v. Adams*, 150 Ga. App. 223, 257 S.E.2d 289 (1979). If the employee handbook requires that a specified amount of vacation is accrued as of a certain time, the Georgia courts will find that the employer is contractually obligated to compensate the employee for the vacation time earned. *See Id.; see also, Ellison v. Dekalb County*, 236 Ga. App. 185, 511 S.E.2d 284 (1999); *Shannon v. Huntley's Jiffy Stores, Inc.*, 174 Ga. App. 125, 329 S.E.2d 208 (1985). Even if there is no written agreement of employment, courts may enforce a customary practice of providing vacation pay. *Anderson v. Chatham,* 190 Ga. App. 559, 379 SE.2d 793 (1989). Neither party has presented evidence from which the Court could conclude as an undisputed fact that CSC either has or does not have a policy or practice with respect to the payment of vacation pay.

If CSC had such a policy or practice, Plaintiff would be entitled to judgment. *See, e.g., In re Ryerson,* 739 F.2d 1423 (9th Cir. 1984) (payment to debtor upon cancellation of insurance agency agreement was property of the estate even though contingent*); Hill v. Muniz (In re Muniz)*, 320 B.R. 697 (Bankr. D. Colo. 2005); *In re Taronji,* 174 B.R. 964 (Bankr. N.D. Ill. 1994) (stock debtor obtained pre-bankruptcy but which became unrestricted post-bankruptcy as a result of the lapse of time was property of the estate to the extent that it was not related to the post-petition services of the debtor and thus excluded from "property of the estate" under section 541(a)(6)); *In re Knight,* 164 B.R. 372 (Bankr. S.D. Fla. 1994) (debtor's interest in trust was property of the estate even though the interest was contingent on debtor's survival and the

Trustee's disbursement of less than the full value of the trust during debtor's lifetime); *Bernstein v. Richardson*, 34 B.R. 611 (Bankr. D. Colo. 1983); *In re Nichols,* 4 B.R. 711 (Bankr. E.D. Mich. 1980).

If CSC has no policy or practice and therefore the payment to a terminated employee of his or her unused vacation pay is totally discretionary, Defendant would be entitled to judgment. *See, e.g., In re Ball,* 201 B.R. 210 (Bankr. N.D. Ill. 1996) (where debtor had no contractual right to payment for accrued vacation and sick pay and payment was wholly discretionary, payment received was not property of the estate); *In re Palmer,* 57 B.R. 332 (Bankr. W.D. Va. 1986) (year-end discretionary bonus was not property of the estate); *In re Dias,* 37 B.R. 584 (Bankr. D. Idaho1984) (trustee had no interest in discretionary disbursements but did have interest in corpus of trust which would vest post-petition).

The Special Pay and General Release Agreement attached to the Affidavit of Valarie J. Smith is some evidence of a policy with respect to the payment of accrued vacation pay since Paragraph 3 separately discussed the lump sum severance and contains the provision "Vacation will accrue in accordance with CSC Consulting's existing vacation accrual policy." However, the Affidavit itself in Paragraph 2.a. states that the lump sum payment ($62,893.74) "reflects all unused vacation for Mr. Peterson," a statement which makes the agreement itself ambiguous, particularly since Exhibit "D" to Plaintiff's Requests for Admissions (admitted by Defendant) appears to separately itemize the lump sum ($62,893.74) and the accrued leave pay ($18,484.98). Additionally, the Defendant's Declaration creates a factual question with respect to the policy in that Paragraph 7 denies that Defendant was entitled to accrued vacation pay and states in Paragraph 9 that his entitlement to vacation pay was a result of the execution of the

separation agreement.

Thus, there is a factual dispute created by the evidence submitted as to the policy and practice of CSC with respect to unused vacation pay which precludes the entry of summary judgment for either party. At the trial of this matter, it would appear that the sole factual issue to be determined is the existence and contents of any CSC policy as to unused vacation pay and its practices with respect to the same.

IV. DEFENDANTS' MOTION TO AMEND ANSWER

Defendants filed their Answer to the Complaint on December 16, 2005. Pursuant to LBR 7026-2, the discovery period in this case expired on March 16, 2006 since the parties did not request another time period in a Rule 16 Report. Defendants promptly filed their Motion for Summary Judgment on April 7, 2006 and Plaintiff's Cross Motion was filed on April 17, 2006. It was only after the service of the Trustee's Motion that Defendants sought to amend their Answer, purportedly to be "consistent with the facts of the case as they have come to know them during the pendency of this litigation." (Defendant's Motion to Amend Answer, ¶ 2 - Docket No. 27).

Amendments to pleadings are governed by Rule 15 of the Federal Rules of Civil Procedure, made applicable by Rule 7015 of the Federal Rules of Bankruptcy Procedure. That Rule provides in relevant part:

> (a) AMENDMENTS. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, in the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely

given when justice so requires. . . . .

> (b) AMENDMENTS TO CONFORM TO THE EVIDENCE. . . . Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial on those issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Fed. R. Civ. P. 15.

Defendants' proposed amendment to their Answer was filed more than twenty days after it was served and after the service of the pleading responding to the counterclaim which was plead with the original answer. As such, leave of court or consent of the Plaintiff is required. While the Motion to Allow the Amendment indicates that its purpose is to conform the Answer to the evidence, the only evidence which is tendered is the affidavit/declaration of Debtor which is based on personal knowledge. It is difficult to see how testimony of the Debtor himself constitutes information which Defendants came to know during the course of the litigation. It is clear that the true purpose of the amendment was to attempt to create a fact issue in an attempt to defeat Plaintiff's Motion for Summary Judgement. Since the Court has found there to be material factual issues even in the absence of the Amended Answer, Defendants' Motion to Amend is denied as MOOT. The Court further notes that if, at trial, the evidence supports the conclusions set forth in the Amended Answer, the Answer will be deemed amended to conform to the evidence at that stage.

Therefore, it is hereby **ORDERED** that Defendants' Motion for Summary Judgment is

DENIED; Plaintiff's Motion for Summary Judgment is **DENIED** and Defendants' Motion to Amend is **DENIED**. The parties are directed to submit to the Court a Proposed Pretrial Order within thirty (30) days of the entry of this Order.

SO ORDERED this 7th day of July, 2006.

Mary Grace Diehl

Mary Grace Diehl
United States Bankruptcy Judge