

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

IN RE:) CASE NO. 89-50106
)
L.D. ALDERSON,) CHAPTER 7
)
) MEMORANDUM OF DECISION RE:
) CLAIM OF EXEMPTIONS
Debtor.)

The matter before the Court is the Claim of Exemptions filed by Debtor L.D. Alderson and the objections thereto. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). This ruling shall constitute Findings and Conclusions as required by F.R.Bankr.P. 7052.

I.

Debtor L.D. Alderson (Debtor) served in the military or was employed by the federal government for many years beginning in the early 1950's. His services were terminated on May 24, 1985. During his years of employment, he accumulated \$34,993.80 in civil service retirement benefits. Upon termination, he immediately became eligible to withdraw those funds. At age 62, he becomes eligible for payments under a civil service deferred annuity.

On May 8, 1989, Debtor filed a Chapter 12 petition for reorganization. On Schedule B-4 filed June 2, 1989, Debtor claimed the following property as exempt: homestead, \$30,000; cash, \$100; household goods, \$2,000; clothing & jewelry, \$300; vehicles,

\$1,250; horses, \$5,000; farm equipment, \$1,500; and personal property, \$500. At that time, Debtor did not identify as property of the estate nor claim as exempt any interest he had in the civil service retirement funds that had accumulated.

By Order entered October 31, 1989, Debtor's case was converted to a Chapter 7 proceeding. In that Order, the Court directed Debtor to file within fifteen days his amended schedules and amended statement of financial affairs and to file within thirty days his final report and account as the Chapter 12 debtor-in-possession, as required by Bankr. Rs. 1007 and 1019. Debtor filed new schedules on December 26, 1989. On Schedule B-4 he claimed the same property exempt at the same values as before except he no longer declared any cash or household goods exempt. Again, Debtor did not identify as property of the estate nor claim exempt any interest he had in civil service retirement funds.

At a § 341 meeting of creditors held January 7, 1990, Debtor acknowledged that the retirement fund existed but he testified that his wife, via a power of attorney, had withdrawn the money while he was incarcerated. Debtor later provided Chapter 7 Trustee Dennis C. Whetzal (Trustee) with a copy of a power of attorney dated August 29, 1985 and signed "L.D. Alderson by Stephanie Claymore attorney in fact." Andrew Reid, Counsel for creditor Eunice I. Gull, individually and as the Administratrix of the Estate of Carl

V. Gull (Gull), upon further investigation learned that Claymore had attempted to withdraw the funds with a letter dated August 29, 1985 to the Office of Personnel Management (OPM) signed by her on Debtor's behalf. OPM, by letter dated September 12, 1985, informed her she could not withdraw the funds because the power of attorney on which Claymore relied was "not acceptable for negotiating civil service retirement [funds]."

Reid's communication with OPM also revealed that Debtor had corresponded with OPM on several occasions in mid-1985. On September 12, 1985, OPM informed Debtor of the amount of his retirement contribution and provided him with some pamphlets on how to estimate his deferred annuity benefits. Hence, as of that date, neither Debtor nor his present wife had withdrawn the accumulated retirement funds. Moreover, by letter dated August 30, 1985, OPM informed Debtor that the Bureau of Indian Affairs was seeking a setoff from his retirement funds of money which Debtor owed them for overdrawn annual leave. As of October 8, 1985, the status of the pending setoff had not been altered by any withdrawal of funds from Debtor's retirement account.

On February 6, 1990, Gull filed an Objection to Exemptions. Therein, Gull argued that some of the property which Debtor deemed exempt was not lawfully his. Further, Gull claimed that the value of personal property claimed exempt under S.D.C.L. § 43-5-4

exceeded the limits imposed by the statute. Finally, Gull argued Debtor had claimed his exemptions in bad faith and that under S.D.C.L. § 43-45-7 he should be disallowed any non absolute exemptions. By Order entered March 9, 1990, the Court found Debtor to be an absconding debtor since he had removed assets to Nebraska and it limited Debtor's exempt property to those absolute exemptions allowed by S.D.C.L. § 43-45-2. Debtor was further ordered to turnover to Trustee

all of the estate owned or possessed by him at the time of filing or conversion, other than the property listed [in S.D.C.L. § 43-45-2] as absolutely exempt, including but not limited to ... [a]ll cash and deposits of money with any savings and loan, banks, financial institution, or other entity.

By Notice of Objection to Claimed Exempt Property filed, February 9, 1990, Trustee objected to Debtor's claimed exemption in the fifteen horses on the grounds that their value exceeded the allowed exemption. Debtor did not file a response to this objection and it was sustained by Order entered March 8, 1990.

By Order entered March 21, 1990, Gull's motion for authorization for Gull to pursue property of the estate was granted. On May 24, 1990, Gull filed a motion for contempt due to Debtor's failure to comply with the March 9, 1990 Order, which directed Debtor to turnover certain property. In her brief in support of her motion, Gull argued that cash and deposits which Debtor had failed to turnover included "those annuity monies

deposited with the United States." A civil contempt order was entered September 18, 1990 because of Debtor's failure to comply with the March 9, 1990 turnover Order.

On September 18, 1990, the Court ordered the United States to turnover the pension funds to Trustee. The United States, by Motion filed February 1, 1991, sought to have the September 18, 1990 pension fund turnover Order vacated because of procedural irregularities. The Motion was granted and the September 18, 1990 Order has been vacated by Order entered this day because turnover of the pension fund should have been sought by Gull with an adversary complaint rather than by motion.

Subsequent to the September 18, 1990 civil contempt Order, Debtor attempted to consummate several "deals" with Trustee to retain the property or to sell it for the estate. The Court refused to authorize any of the procedures. To date, Debtor has not fully complied with the March 9, 1990 turnover Order and he is still in contempt of this Court pursuant to the Order of Contempt entered September 18, 1990. Certification of the matter to the Federal District Court for the District of South Dakota for a finding of criminal contempt is presently under this Court's consideration.

On December 18, 1990, Debtor filed a Claim of Exemptions. He acknowledged that he had not declared his "Civil Service Retirement

benefits under 5 U.S.C.S. §8346(a)" as exempt in the past but he now asks the Court to declare that property exempt. The pleading was **not** served on all creditors and parties in interest.

Gull filed a response on January 14, 1991. She argues Debtor's claim of exemption in the pension funds should be denied because of Debtor's failure to comply with the Court's earlier turnover order and contempt order. Trustee responded to Debtor's Claim of Exemptions on January 17, 1991. He argues Debtor's claim of exemption in the pension funds is untimely because Debtor did not object to the Court's earlier order directing the United States to turnover those funds. The United States responded on January 22, 1991. It argues that Debtor may declare the property exempt under 11 U.S.C. § 522(c)(10) and that the funds are not property of the estate pursuant to 11 U.S.C. § 541(c).¹

A hearing was held March 5, 1991 and the matter was taken under advisement. Subsequent to the hearing and at the Court's request, Trustee filed a status report on June 6, 1991. He reviewed his efforts to administer the case and Debtor's continued

¹ The Court does not herein render a decision on whether Debtor's civil service retirement funds are property of the estate. Debtor has not raised the issue. See 11 U.S.C. § 522 (b) ("[A]n individual debtor may exempt **from property of the estate**") Moreover, the United States' argument in its response to Debtor's Claim of Exemption that the benefits are not estate property did not appropriately present the issue for resolution at this time because a determination of an interest in property must be sought by complaint. See. F.R.Bankr.P. 7001(2).

failure to turnover the estate property.

II.

A debtor may exempt from property of the estate

any property that is exempt under Federal law, other than [the Federal exemptions allowed under §§ 522(b)(1) and 522(d)], or State or local law that is applicable on the date of the filing of the petition[.]

11 U.S.C. § 522(b)(2) (in pertinent part). The debtor is responsible for filing a list of the property that he claims exempt. 11 U.S.C. § 522(l). The list must be filed within fifteen days of the petition filing date unless an extension of time is granted for cause shown. Bankr. Rs. 1007 and 4003(a). The list may be amended at any time before the case is closed. Bankr. R. 1009. Notice of the amendment must be given "to the trustee and to any entity affected thereby." Id.

The listed property is deemed exempt unless a timely objection is filed. 11 U.S.C. § 522(l). Objections must be filed within thirty days of the § 341 meeting of creditors or the filing of any amendment to the list. Bankr. R. 4003(b). The objector bears the burden of proving that an exemption has not been properly claimed. Bankr. R. 4003(c).

Since Bankr. R. 1009 allows a debtor to amend his schedules at any time before the case is closed, it is not within a court's discretion to prohibit a debtor from making a timely amendment. In re Doan, 672 F.2d 831, 833 (11th Cir. 1982)(citing In re

Gershenbaum, 598 F.2d 779, 781-82 (3rd Cir. 1979)). The Court of Appeals for the Eleventh Circuit, however, recognized one caveat to that general rule. "[A] court might deny leave to amend on a showing of a debtor's bad faith or of prejudice to creditors." Id. While the court noted that simple delay in filing an amendment is not necessarily prejudicial to creditors, it did find that concealment of an asset will bar exemption of that asset. Id.

Several courts have followed the rationale espoused in Doan. Viewing the totality of the circumstances surrounding the filing of an amendment to a claim of exemptions, the court in In re Fabian, 122 B.R. 678, 682 (Bankr. W.D. Pa 1990), held that a debtor may be prohibited from amending the schedule upon a showing of bad faith or prejudice to creditors. The showing must be by clear and convincing evidence. Id. The court in Fabian found cogent the fact that the debtor did not acknowledge the existence of the asset in question until a creditor sought relief from the stay to pursue it. Id. The court also noted the debtor's continued machinations in the case that delayed creditors' activities. Id. at 682-83.

The court in In re Myatt, 101 B.R. 197, 199 (Bankr. E.D. Cal. 1989), also adopted the clear and convincing standard of proof for establishing a bad faith filing of an exemption.

The intermediate standard of clear and convincing evidence insures the protection of creditor's rights and the court's policy of "permissive amendment" pursuant to Rule 1009.

Id. Indications of bad faith considered by the Myatt court included the timeliness of the amendment to the claimed exemptions. Id. at 199-201.

In In re Blaise, 116 B.R. 398, 400 (Bankr. D. Vt. 1990), the court followed the general rationale of Doan, Fabian, and Myatt but it emphasized one distinction. The court held that while it must allow a debtor to amend his schedule of exempt property at any time before the case is closed, the court may still deny the exemption upon a timely objection. "The right to amend ... is not the same as the right to an exemption." Id. The court otherwise agreed with the cases cited above and held:

A trustee or any party in interest has as much right to object to the additional claim of exemptions as they have a right to object to the original claim of exemptions. [Cite omitted.] Upon objection by the trustee, allowance of the amended exemption depends on other considerations, namely, whether there is a showing of bad faith by the debtor or prejudice to creditors. [Cites omitted.]

Blaise, 116 B.R. at 400. The court in Blaise relied on two key facts in concluding that the debtors were entitled to their amended exemption. First, the asset exempted by the amendment had been listed as property of the estate by the debtors on their **original** schedules. Id. at 401. Second, the debtors quickly amended their schedule of exempt property as soon as the trustee collected the asset. Id. at 402.

A debtor's bad faith in filing an amended claim of exemption

may be found if the debtor knowingly makes a material, false statement in his schedules. Drewes v. Magnuson (In re Magnuson), 113 B.R. 555, 558 (Bankr. D.N.D. 1989). "A statement is material if it concerns the existence and disposition of property." Id. Failure to amend erroneous schedules promptly constitutes reckless indifference to the truth, which is the equivalent of fraud. Id. at 559 (citations omitted). Further, an exemption claim may be disallowed when a debtor fraudulently conceals an asset that he later claims as exempt. Id. at 560 (citing In re Hanson, 41 B.R. 775, 778 (Bankr. D.N.D. 1984)²; Redmond v. Tuttle, 698 F.2d 414, 417 (10th Cir. 1983)); see also In re Roberts, 81 B.R. 354, 363 (Bankr. W.D. Pa. 1987). "Since fraudulent intent rarely is susceptible to direct proof, courts long have accepted extrinsic evidence of fraud." Hanson v. First National Bank, 848 F.2d 866, 868 (8th Cir. 1988).

III.

This Court concludes that Debtor shall be denied any claim of exemption in his civil service retirement funds. First, Debtor has failed to serve all effected parties with notice of his amended

² The United States Court of Appeals for the Eighth Circuit has not clearly ruled whether a fraudulently **concealed** asset may later be claimed as exempt. It has, however, held that a debtor may be denied an exemption where he converts non exempt property into exempt property with an "actual intent to defraud creditor[s]." Hanson v. First National Bank, 848 F.2d 866, 868 (8th Cir. 1988).

claim of exemptions. Since Debtor's retirement funds may constitute unsecured funds that are available for payment of claims against the estate, **all** creditors should have been notified of Debtor's claim that the funds are exempt.

Second and most important, Debtor has exhibited bad faith in filing this amended exemption claim. Debtor's testimony at the § 341 meeting on January 7, 1990, that he thought his wife had withdrawn the retirement funds is not credible. Debtor's correspondence to and from OPM in 1985 indicates he knew that his wife's efforts to withdraw the funds had been unsuccessful. Moreover, during the two years Debtor has been in bankruptcy, he did not file an amendment to his schedules which acknowledged that the retirement funds existed. His present filing of an amended exemption claim was prompted only after creditor Gull, on behalf of the estate, and the United States, on behalf of itself under a setoff theory³, expressed an interest in recovering the funds. Finally, Debtor's continued efforts to thwart or delay the administration of this estate precludes any leniency by the Court in allowing this claim of exemption.

An order denying the Claim of Exemptions will be entered.

³ The soundness of the United States' setoff claim is not presently before the Court and no opinion on it is rendered herein.

Dated this 27th day of August, 1991.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By _____
Deputy Clerk

(SEAL)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

IN RE:) CASE NO. 89-50106
)
L.D. ALDERSON,) CHAPTER 7
)
) ORDER DENYING
) CLAIM OF
Debtor.) EXEMPTIONS

In recognition of and compliance with the Memorandum of Decision Re: Claim of Exemptions entered this day,

IT IS HEREBY ORDERED that the Claim of Exemptions filed December 18, 1990 by Debtor L.D. Alderson is DENIED.

So ordered this _____ day of August, 1991.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By _____
Deputy Clerk

(SEAL)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

IN RE:) CASE NO. 89-50106
)
L.D. ALDERSON,) CHAPTER 7
)
) ORDER VACATING TURNOVER
) ORDER ENTERED
Debtor.) SEPTEMBER 18, 1990

Upon consideration of the United States' Motion to Vacate Order, the responses thereto, and the arguments of counsel and it appearing that the relief granted in the Turnover Order entered September 18, 1990 should have been sought by an adversary complaint under Bankr. R. 7001 rather than by a motion under Bankr. R. 9014 and it further appearing that the United States' Motion to Vacate Order is timely,

IT IS HEREBY ORDERED that the Court's Turnover Order entered September 18, 1990 is VACATED.

So ordered this _____ day of August, 1991.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By _____
Deputy Clerk

(SEAL)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

IN RE:) CASE NO. 89-50106
)
L.D. ALDERSON,) CHAPTER 7
)
) ORDER GRANTING
) ATTORNEY FEES
Debtor.) AND EXPENSES

In compliance with this Court's Order of Contempt entered September 18, 1990 and upon consideration of the Affidavit of Counsel Re Terms on Third Motion for Contempt and Statement of Time and Expenses Re Third Motion for Contempt filed by Andrew B. Reid, counsel for creditor Eunice I. Gull, individually and as the Administratrix of the Estate of Carl V. Gull (Gull), and said Affidavit and Statement having been served on interested parties and no objections thereto having been filed timely,

IT IS HEREBY ORDERED that Debtor shall pay the sum of \$2,753.22 to Andrew B. Reid as reasonable attorney fees and expenses incurred in connection with Gull's Motion for Contempt filed May 24, 1990.

So ordered this _____ day of August, 1991.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By _____
Deputy Clerk
(SEAL)