

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF SOUTH DAKOTA  
WESTERN DIVISION

IN RE:	)	CASE NO. 89-50093-INH
	)	ADVERSARY NO. 89-5037-INH
WESLEY D. GINSBACH and	)	
JULIE A GINSBACH,	)	CHAPTER 7
	)	
Debtors.	)	MEMORANDUM OF DECISION RE:
	)	DEBTORS' COMPLAINT TO
WESLEY D. GINSBACH and	)	REQUIRE TURNOVER OF PROPERTY
JULIE A. GINSBACH,	)	OF THE ESTATE BY A CUSTODIAN
DENNIS C. WHETZAL, Chapter 7	)	AND DEBTORS' MOTION FOR
Trustee,	)	HEARING GRANTING JUDGMENT
	)	RELEASING EXEMPT PROPERTY
Plaintiffs,	)	AND RESPONSE THERETO
v.	)	
	)	
SECURITY BANK OF SOUTH DAKOTA,	)	
N.A., and DICK DAVIS, Butte	)	
County Sheriff, Custodian,	)	
	)	
Defendants.	)	

The matters before the Court are Debtors' Complaint to Require Turnover of Property of the Estate by a Custodian and Debtors' Motion for Hearing Granting Judgment Releasing Exempt Property and the objections to the Motion filed by creditors Security Bank of South Dakota, N.A., and Global Financial Services, Inc. The matters were submitted to the undersigned for consideration upon receipt of briefs. This ruling shall constitute Findings and Conclusions as required by Bankr. R. 7052.

I.

Debtors Wesley D. and Julie A. Ginsbach (Debtors) filed a Chapter 7 petition on April 28, 1989. Debtors claimed as exempt several items of property, including "tack" valued at \$600 and "property in possession of Butte County Sheriff" valued at \$2,000. The total value of property claimed exempt was \$35,785, including \$1,850 of items absolutely exempt and a \$30,000 homestead. Debtors have not filed any amendments to their schedule of exempt property.

The § 341 meeting of creditors was held on its originally scheduled date of June 1, 1989. No objections to Debtors' claim of exemptions were filed within thirty days after the § 341 meeting was concluded, as required by Bankr. R.

4003(b).

On September 12, 1989 Debtors<sup>1</sup> filed a Complaint to Require Turnover of Property of the Estate by a Custodian. Debtors sought a turnover of property, primarily tack, that was held by the Butte County Sheriff upon a levy in January, 1989. Debtors offered to pay reasonable costs for the seizure and storage of the items. Defendant Security Bank of South Dakota, N.A. (Security Bank), answered the Complaint on October 17, 1989. It denied that the property held by the Sheriff was exempt and argued that Debtors had undervalued the items. Defendant Dick Davis, Butte County Sheriff, did not answer.

The Court issued a Preliminary Pre-trial Order on October 19, 1989 and directed the parties to file a joint pre-trial statement not less than twenty-four hours before the pre-trial hearing scheduled for November 28, 1989. No joint pre-trial statement was timely filed and the pre-trial hearing was not held as scheduled. On June 25, 1990, Debtors filed within the adversary proceeding a Motion for Hearing Granting Judgment Releasing Exempt Property. With this Motion, Debtors sought essentially the same relief as they did in the original complaint. Creditor Global Financial Services (Global) objected to the Motion on July 5, 1990. In its objection, Global summarized a pre-bankruptcy state court proceeding in which various property held by Debtor Wesley Ginsbach was levied by the Butte County Sheriff to execute a judgment held by Security Bank. In that state court proceeding, the Sheriff took possession of the property on January 13 and 16, 1989 and Wesley declared numerous items of tack exempt on February 7, 1989. Ten days later, the state court ordered the Sheriff to release the exempt property to Wesley. On April 18, 1989, Wesley's mother-in-law and a sister-in-law filed claims of ownership on the levied property that was still in the Sheriff's possession. On April 25, 1989, a sheriff's jury was convened. The jury concluded that of the property still in the Sheriff's possession, all but nine specific items were Wesley's property. Upon filing bankruptcy three days later, Debtors declared exempt the property still held by

---

<sup>1</sup> The complaint is captioned with Debtors and Dennis C. Whetzal, Chapter 7 Trustee, as plaintiffs. It is signed by Robert M. Nash. Trustee Whetzal did not sign the complaint nor has he sought Court approval to retain Mr. Nash as his counsel in this matter.

the Sheriff and valued it at \$2,000. Global now argues that Debtors cannot exempt in the bankruptcy proceeding the property retained by the Sheriff since Debtors did not declare that same property to be exempt in the state court proceeding. Security Bank has joined Global's Objection.

A Joint Pretrial Statement was filed July 10, 1990 and both the Complaint and Motion were heard that day. Debtors and Security Bank filed memoranda in support of their pleadings.

## II.

Property of the estate includes property "wherever located and by whomever held" in which the debtor has a legal or equitable interest at the time the case is commenced. 11 U.S.C. § 541(a)(1). A debtor may exempt from property of the estate "any property that is exempt under ... State ... law that is applicable on the date of the filing of the petition ...." 11 U.S.C. § 522(b) (in pertinent part); Hollytex Carpet Mills v. Tedford, 691 F.2d 392, 393 (8th Cir. 1982). Its value is determined as of the date the petition is filed. Armstrong v. Hursman (In re Hursman), 106 B.R. 625, 626 (Bankr. D.N.D. 1988). Within thirty days after the conclusion of the meeting of creditors or the filing of any amendment to the list of exempt property, the trustee or a creditor may file objections to the list of property claimed as exempt. Bankr. R. 4003(b). If no objections are filed, the property claimed exempt is deemed exempt. 11 U.S.C. § 522(1).

A court may order "an entity ... in possession ... during the case, of property ... 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 ... ." 11 U.S.C. § 542(a) (in pertinent part) (emphasis added).

Under applicable South Dakota law, the title of levied property is not transferred until the property is sold. S.D.C.L. §§ 15-19-1, 15-19-17, 15-19-25, and 15-19-16. The levy may constitute a lien on the property. S.D.C.L. § 15-18-31. The lien on property capable of manual delivery is perfected against other judicial creditors upon possession by the levying officer. Id.; S.D.C.L.

§ 15-18-20; First Potter County Bank v. Hogg (In re Hogg), 35 B.R. 292, 296-97 (Bankr. D.S.D. 1983).

III.

A.

The first issue presented is whether the creditors may challenge Debtors' exempt property claim in this turnover action when the creditors did not timely file any objections to Debtors' claim of exemptions.

In Halverson v. Peterson (In re Peterson), 920 F.2d 1389 (8th Cir. 1990) (1990 WL 197739), the issue presented was whether untimely filed objections to exemptions should be considered. The court held:

Rule 4003(b) establishes a bright-line, thirty-day limit for objections to claimed exemptions. ... [T]his limit creates a certain date from which various parties' rights and obligations may be ascertained. Moreover, the Bankruptcy Rules indicate that the thirty-day limit is important: Rule 9006(b)(3) explicitly prevents courts from enlarging 4003(b)'s time unless the trustee requests an extension within the original thirty-day period. [Cite omitted.] To permit a full examination of the merits of a claimed exemption where the trustee has not filed an objection on time would render Rule 4003(b) nugatory. This bright-line rule, however, should not be applied so as to provide debtors with an undeserved windfall. The undesirable effects of "exemption by declaration" should be avoided.

The dangers of "exemption by declaration," however, are not significant enough to warrant permitting a trustee another bite at the debtor's apple where the debtor has claimed certain property exempt in good faith. ... [Instead], we hold today that debtors must show only a good-faith statutory basis for their claimed exemptions when a trustee files an untimely objection[.]

....

We believe the "good-faith statutory basis" approach we adopt today best balances the equities present in situations where a bankruptcy trustee fails to object on time to a claimed exemption. Where a trustee fails to object on time, there will be no "exemption by declaration." The trustee, however, will not be permitted to challenge the merits of a claimed exemption --the bankruptcy court need only decide whether the debtor had a good-faith statutory basis for it. This places the burden of objecting to claimed exemptions where it belongs, on the trustee. If a claimed exemption lacks a good-faith statutory basis, the debtor will not receive an unjust windfall. But if it does, the trustee will not be rewarded for "rest[ing] on his rights in the face of Rule 4003(b)." [Cite omitted.]

Id. at \_\_\_\_\_. While the court's decision in Peterson was not in the context of a turnover action, its rationale indicates that an untimely objection to an exemption -- whether a direct objection under Bankr. R. 4003(b) or, as here, an

indirect objection to an exemption via an objection to turnover -- only raises the question of whether the exemption has a good-faith statutory basis<sup>2</sup>.

After careful consideration of the Debtors' schedule of exempt property and the applicable exemption statutes and upon application of Peterson, the Court concludes that Debtors' exemptions have a good faith statutory basis. First, at the time Debtors filed their petition in bankruptcy, the property in the Sheriff's possession was property of the estate which Debtors could exempt. Although the Sheriff had possession of the property, title did not vest in him nor had title to the property been transferred to a purchaser via an execution sale. S.D.C.L. §§ 15-19-1, 15-19-17, 15-19-25, and 15-19-16. Second, the value of the "non absolute" exemptions claimed under S.D.C.L. § 43-45-4 does not exceed the statutory limits and no evidence was presented that the values Debtors placed on the exempt items were so erroneous as to indicate bad faith. Further, the Court can find no basis for concluding Debtors exhibited bad faith by use of the descriptive term "property held by the Butte County Sheriff." Although the description is somewhat elusive, it is not so non-specific as to render the exemption without legal effect. See In re Ogden, 114 B.R. 730, 731 (Bankr. D. Colo. 1989).

While the Court would question why there was not a timely challenge to the merit of some of Debtors' exemptions, especially the value of the horses and the property held by the Sheriff, the time for litigating those issues has passed. Further, Debtors' minimal showing in this turnover action that the claimed exemptions had a good-faith statutory basis was essentially unchallenged. Therefore, the Court concludes, pursuant to 11 U.S.C. § 522(1), that the property claimed exempt by Debtors is deemed exempt in this bankruptcy proceeding.

---

<sup>2</sup> Several courts have considered the issue of whether a creditor must file timely objections to a debtor's exemptions in order to preserve that issue when the debtor tries to avoid a lien on the exempt property under 11 U.S.C. § 522(f). Two divergent theories have emerged. See In re Mitchell, 80 B.R. 372 (Bankr. W.D. Tex. 1987) (judicial lien creditor's failure to object to debtor's exemptions within the time limits imposed by Bankr. R. 4003 did not estop the creditor from objecting to the efficacy of the exemption in a lien avoidance action); contra In re Hahn, 60 B.R. 69 (Bankr. D. Minn. 1985). This Court finds that issue distinguishable from the turnover action presented here and renders no opinion on it.

B.

Having determined that the property claimed by Debtors is deemed exempt, the Court must next determine whether the Sheriff should be ordered to turnover Debtors' exempt property in his possession.

Property of a debtor seized by a creditor prior to the filing of a petition may be subject to turnover. 11 U.S.C. § 542(a); United States v. Whiting Pools, Inc., 462 U.S. 198, \_\_\_, 103 S.Ct. 2309, 2315 (1983). While the decision in Whiting Pools was based on different facts<sup>3</sup>, a similar conclusion must be reached here.

First, the Court can find no distinction in the application of the turnover provisions under § 542(a) on property to be used, sold, or leased by a trustee from property that a debtor may claim exempt. The Code appears to treat these two types of property the same for turnover purposes. Second, there are three explicit limitations on the reach of § 542(a):

[T]urnover is not required ...: when the property is of inconsequential value or benefit to the estate, § 542(a), when the holder of the property has transferred it in good faith without knowledge of the petition, § 542(c), or when the transfer of the property is automatic to pay a life insurance premium, § 542(d).

Whiting Pools, 103 S.Ct. at 2314 n.12. None apply here. Further, the turnover provisions of § 542 make no distinction between liquidation proceedings, debt adjustments, or reorganizations. Finally, § 542(a) does not require that the debtor hold a possessory interest in the property at the commencement of the bankruptcy. Id., 103 S.Ct. at 2314; see id., 103 S.Ct. at 2315 n.17.

In Whiting Pools, the Supreme Court recognized that turnover of property seized by the IRS may be conditioned, pursuant to 11 U.S.C. § 363(e), on the debtor providing adequate protection of IRS's interest in the seized property. Id., 103 S.Ct. at 2317. Since the property to be turned over to the Trustee here is exempt property and no longer property that the trustee may use, sell, or lease under 11 U.S.C. § 363, the adequate protection provisions of § 363(e) and

---

<sup>3</sup> The Court's holding was limited to recovery in a reorganization case of property seized by the Internal Revenue Service under a tax lien. Whiting Pools, 109 S.Ct. at 2315 n.17.

§ 361 do not apply. This Court, therefore, need not fashion a turnover order that protects the interest, if any<sup>4</sup>, that the Sheriff retains in this property.

An order directing the Butte County Sheriff to deliver Debtor's exempt property in his custody to the Trustee<sup>5</sup> and granting Debtors' Motion for Hearing Granting Judgment Releasing Exempt Property will be entered.

Dated this 29th day of January, 1991.

BY THE COURT:

\_\_\_\_\_  
Irvin N. Hoyt  
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By \_\_\_\_\_  
Deputy Clerk

(SEAL)

---

<sup>4</sup> Since no debts will be discharged, Global Financial Services v. Ginsbach (In re Ginsbach), Bankr. No. 89-50093-INH, Adversary No. 89-5031, slip op. (Bankr. D.S.D. March 19, 1990) (Order Denying Discharge entered), Security Bank's judgment will not be extinguished. Further, Debtors have not sought to avoid any lien on their exempt property. See 11 U.S.C. § 522(f). Accordingly, the final determination of the Sheriff's interest, if any, in this property after turnover is not now before this Court.

<sup>5</sup> Section 542(a) makes no provision for turnover of property to anyone but the Trustee.

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF SOUTH DAKOTA  
WESTERN DIVISION

IN RE: )  
 ) CASE NO. 89-50093-INH  
 ) ADVERSARY NO. 89-5037-INH  
WESLEY D. GINSBACH and )  
JULIE A GINSBACH, )  
 ) CHAPTER 7  
 )  
Debtors. )  
 ) ORDER RE:  
 ) DEBTORS' COMPLAINT TO  
WESLEY D. GINSBACH and ) REQUIRE TURNOVER OF PROPERTY  
JULIE A. GINSBACH, ) OF THE ESTATE BY A CUSTODIAN  
DENNIS C. WHETZAL, Chapter 7 ) AND DEBTORS' MOTION FOR  
Trustee, ) HEARING GRANTING JUDGMENT  
 ) RELEASING EXEMPT PROPERTY  
Plaintiffs, ) AND RESPONSE THERETO  
 )  
v. )  
 )  
SECURITY BANK OF SOUTH DAKOTA, )  
N.A., and DICK DAVIS, Butte )  
County Sheriff, Custodian, )  
Defendants. )

In recognition of and compliance with the Memorandum of Decision Re: Debtors' Complaint to Require Turnover of Property of the Estate by a Custodian and Debtors' Motion for Hearing Granting Judgment Releasing Exempt Property and Response Thereto entered this day,

IT IS HEREBY ORDERED that the Butte County Sheriff shall deliver Debtors' exempt property in his custody to the Trustee; and IT IS FURTHER ORDERED that the Debtors' Motion for Hearing Granting Judgement Releasing Exempt Property is hereby GRANTED.

Dated this \_\_\_\_\_ day of January, 1991.

BY THE COURT:

\_\_\_\_\_  
Irvin N. Hoyt  
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By \_\_\_\_\_  
Deputy Clerk

(SEAL)