In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

ARLIE SCOTT PALMER a/k/a A. Scott Palmer a/k/a Scott Palmer Debtor.	Bankruptcy No. X87-01417S Chapter 7
DONALD H. MOLSTAD, Trustee Plaintiff vs. NATIONAL AUTOMOBILE DEALERS & ASSOCIATES RETIREMENT TRUST Defendant.	Adversary No. X88-0147S

ORDER RE: MOTION FOR SUMMARY JUDGMENT

The matter before the court is a motion for summary judgment filed by the defendant National Automobile Dealers & Associates Retirement Trust (NADART). A hearing was held on May 23, 1989 in Sioux City, Iowa.

The parties have filed briefs in support of their positions. The court, having considered the arguments of the parties, now issues the following findings of fact and conclusions of law pursuant to Bankr. R. 7052. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(E).

FINDINGS OF FACT

The debtor, Arlie Scott Palmer, filed his voluntary petition under chapter 7 of the Bankruptcy Code on June 19, 1987. On schedule B-2 to the petition, the debtor listed an employee retirement plan as an item of personal property. The schedule indicates that the stated value of the plan was $18,271.00. However, the debtor listed the market value of the employee retirement plan as zero. On schedule B-4 to the petition, the debtor claimed his interest in the employee retirement plan as exempt.

On August 24, 1987, the trustee, Donald Molstad, filed an objection to the debtor's exemption in the pension plan. The court[1] sustained the objection to exemption on December 2, 1987.

The trustee commenced this adversary proceeding on May 23, 1988 asking the court to require the defendant to turn over any interest the debtor had in his retirement account. The trustee contends that the pension plan is property of the debtor's estate. The defendant resists arguing the debtor's interest in

the plan is not property of the estate because of the exception provided by 11 U.S.C. §541(c)(2). A motion for summary judgment was filed by the defendant on February 8, 1989.

In support of its motion for summary judgment, the defendant included affidavits of Kenneth Kahley and Barbara Collins. Kahley is President of Asher Motor Company in Spencer, Iowa, the debtor's employer. Barbara Collins is Compliance Officer for the National Automobile Dealers & Associates Retirement Trust.

The debtor is 47 years old. He has been employed by Asher Motor Company since December 29, 1969.

Asher Motor Company has been a party to the NADART Pension and Profit Sharing Master Plan and Trust Agreement since April 1, 1972. The debtor has been a participant in the NADART plan since that date. The value of the debtor's pension plan as of February 3, 1989 was $25,075.81.

The NADART plan is a "qualified" plan under §401 of the Internal Revenue Code. The plan is exempt from income tax pursuant to 26 U.S.C. §501(a). The NADART plan contains the following anti-alienation provision:

> Benefits payable under the Plan shall not be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance, charge, garnishment, execution, or levy of any kind either voluntary or involuntary, and any attempt to anticipate, alienate, sell, transfer, assign, pledge, encumber, charge or otherwise dispose of any right to benefits payable hereunder shall be void. . . . The Trust shall not in any manner be liable for, or subject to, the debts, contracts, liabilities, engagements, or torts of any person entitled to benefits hereunder.

This provision of the plan appears to meet the provisions of 26 U.S.C. §401(a)(13) and 29 U.S.C. §1056(d)(1). Employer contributions and involuntary contributions made by the debtor are not subject to distribution until the earlier of the employee's termination of employment (voluntary or involuntary), death, total disability or normal retirement at age 65. Any voluntary contributions made by the employee can be withdrawn at any time. The debtor has not made any voluntary contributions.

The debtor cannot borrow any money from the plan. The plan does not contain a hardship withdrawal provision.

The participants in the NADART plan are required to contribute 2% of their compensation to the plan (involuntary contribution). The employer provides a matching contribution equal to 2% of a participant's compensation plus 5.7% of compensation over the taxable wage base.

The National Automobile Dealers and Associates Retirement Trust is located in Virginia. The trust agreement is administered in accordance with the laws of the state of Virginia.

DISCUSSION

I.

"Summary judgment is appropriate only when there is no genuine issue of material fact, so that the dispute may be decided on purely legal grounds." Agristor Leasing v. Farrow, 826 F.2d 732, 734 (8th

Cir. 1987), citing Holloway v. Lockhart, 813 F.2d 874, 878 (8th Cir. 1987). The parties agree that there are no disputes as to any issues of material fact.

II.

The defendant argues that the trust constitutes a spendthrift trust under Virginia law and therefore the debtor's interest in the trust is excluded from the debtor's bankruptcy estate pursuant to 11 U.S.C. §541(c)(2). The plaintiff-trustee argues that an ERISA plan is not a traditional spendthrift trust as recognized by state law and therefore the exception of 11 U.S.C. §541(c)(2) is not applicable.

Property of the estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. §541(a)(1). The scope of §541 is intended to be broad. United States v. Whiting Pools, 462 U.S. 198, 103 S.Ct. 2309, 2313, 76 L.Ed.2d 515 (1983). However, "a restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable non-bankruptcy law is enforceable in a case under this title." 11 U.S.C. §541(c)(2). This type of restricted trust is not property of the estate.

By 11 U.S.C. §541(c)(2), Congress intended to preserve the status of the traditional spendthrift trust as recognized by state law. In re Graham, 726 F.2d 1268, 1271 (8th Cir. 1984). Bankruptcy judges in this district have previously relied on the language of Graham to conclude that all ERISA-qualified pension plans are included in the debtor's estate and are excluded only by exemption. See In re Flygstad, 56 B.R. 884 (Bankr. N.D. Iowa 1986); In re McKenna, 58 B.R. 221 (Bankr. N.D. Iowa 1985); In re McCormick, slip op. no. 83-00024 (Bankr. N.D. Iowa, June 19, 1987); Baron v. Kodak Retirement Income Plan (In re Johnson), slip op no. X88-0026S (Bankr. N.D. Iowa, January 9, 1989).

The Eighth Circuit Court of Appeals has recently rendered a decision which requires a somewhat different approach. Humphrey v. Buckley (In re Swanson), slip op. no. 87-5513 (8th Cir. May 2, 1989), requires this court to determine whether NADART is a spendthrift trust under Virginia law. If it is, it is excluded from the estate by the force of 11 U.S.C. §541(c)(2).

III.

"In general terms, a spendthrift trust is one in which the right of the beneficiary to future payments of income or capital cannot be voluntarily transferred by the beneficiary or reached by his or her creditors. There is a conflict of authority among the states on the question of validity of such trusts and on the extent to which a beneficiary's right to future income and principal can be protected." In re Graham, 726 F.2d 1268, 1271 (8th Cir. 1984) citing 2 A. Scott, The Law of Trust; §151 (3d Edition 1967); G. Bogert, Handbook of the Law of Trusts §40 (5th Edition 1973).

The National Automobile Dealers and Associates Retirement Trust Pension and Profit Sharing Plan is governed by Virginia law. The trust, is located in Virginia and the trust agreement is administered in accordance with the laws of the state of Virginia.

A spendthrift trust is valid in the state of Virginia. Va. Code §55-19. Alderman v. Virginia Trust Company, 181 Va. 497, 25 S.E.2d 333 (1943); Allen v. Wilson, 3 B.R. 439 (Bankr. W.D. Va. 1980). The foregoing Code section states:

> Estates of every kind holden or possessed in trust shall be subject to the debts and charges of the persons to whose use or to whose benefit they are holden or possessed, as they would be if those persons owned the like interest in the things holden or possessed as in

> the uses or trusts thereof; but any such estate, not exceeding $500,000.00 in actual value, may be holden or possessed in trust upon condition that the corpus thereof and income therefrom, or either of them, shall be applied by the trustee to the support and maintenance of the beneficiaries without being subject to their liabilities or to alienation by them, but no such trust shall operate to the prejudice of any existing creditor or the creator of such trust.

Va. Code §55-19. The spendthrift trust is to prevent alienation and to free the income from claims of the beneficiary's creditors. Colonial-American National Bank v. United States, 243 F.2d 312 (4th Cir. 1957).

> The defining characteristics of a spendthrift trust are three in number. The trust must provide for the support and maintenance of its beneficiary. In addition, the settlor must intend, whether evidenced by express provision or implied from the four corners of the trust instrument, to protect the trust from the beneficiary's creditors. Lastly, the settlor must intend also to prevent the beneficiary's voluntary or involuntary alienation.

In re Hersch, 57 B.R. 667, 668-669 (Bankr. E.D. Va. 1986).

The court concludes that for two reasons, the NADART employee pension plan is not a spendthrift trust under Virginia law.

First, Virginia Code §55-19 requires that the trust be conditioned upon corpus or income being applied by the trustee to the support and maintenance of the beneficiaries. See also In re Hersch, 57 B.R. 667, 668 (Bankr. E.D. Va. 1986). The trust document of NADART does not expressly require any payments on account of maintenance or support, but conditions payment on voluntary or involuntary termination of employment (section 7.1) or on retirement (Article IX). Voluntary contributions, of which in this case there are none, may be withdrawn at any time (sections 9.8 and 9.9).

More importantly, the court does not believe NADART qualifies as a spendthrift trust because the trust is in part self-settled by Palmer, the debtor. Under Virginia law, a spendthrift trust made under Va. Code §55-19 may not be self-settled. Parkinson v. Bradford Trust Co. of Boston (In re O'Brien), 50 B.R. 67, 75 (Bankr. E.D. Va. 1985). Contra Nachman v. Diaz (In re Diaz), 50 B.R. 22 (Bankr. E.D. Va. 1985).

In O'Brien, the Keough plan was entirely self-settled. The court has not found any Virginia cases indicating whether contributions to the trust by a third party would vitiate the requirement that the beneficiary not be the settlor of a spendthrift trust.

However, the Eighth Circuit Court of Appeals has said with regard to Minnesota law that "[t]he fact that the contributions to the Fund are made, at least in part, by the debtors compels a conclusion that the Fund would not be a valid spendthrift trust. . . ." Humphrey v. Buckley (In re Swanson), slip op. no. 87-5513 at 6 (8th Cir. May 2, 1989). Because the debtor has contributed his earnings to the trust, even though the employer makes matching contributions, this court cannot find that the trust is a spendthrift trust under Virginia law.

In Humphrey v. Buckley, Id. the Eighth Circuit indicated that the ability of the debtors to obtain their contributions upon termination of employment was, although limited, "inimical to the policies underlying the spendthrift trust." Id. at 6. Palmer, upon voluntary termination of his employment,

would have a similar right to full settlement of his interest in the plan (section 7.1). This level of control, however, has been held not to be detrimental to the existence of a spendthrift trust in Virginia. Creasy v. Coleman Furniture Corp., 83 B.R. 404, 407-408 (W.D. Va. 1988).

IV.

The defendant also argues that the distribution of the debtor's interest in the trust to the trustee is prohibited by 26 U.S.C. §401(a)(13) and 29 U.S.C. §1056(d). These sections provide that an ERISA-qualified pension plan must provide that benefits under the plan may not be assigned or alienated. The defendant argues that requiring the defendant to turnover the debtor's interest in the trust would subject the trust to the possibility of being disqualified as an ERISA plan and prevent the trust from being exempt from federal income taxes. Defendant cited in its brief Private Letter Ruling 8131020 (May 5, 1981) as an example of IRS's position on this issue. The Letter Ruling states in part:

> Neither the regulations under Code §401(a)(13), nor the legislative history of this section provide any exception to the anti-alienation requirements for an attachment arising from a bankruptcy proceeding. In this case, the above-described order of the United States Bankruptcy Court, if honored, would benefit the general creditors of the plan participant in question and thus, would result in a prohibitive attachment.... Therefore, we conclude that the honoring by Company M of the pension deduction order of the United States Bankruptcy Court will violate §401(a)(13) of the Code and will result in the disqualification of Plan X.

Private Letter Ruling 8131020 (May 5, 1981), cited in Dumbaugh v. United Airlines, Inc. Pilots Directed Account Retirement Income Plan (In re McCormick), slip op. no. 86-0075C at 9-10 (Bankr. N.D. Iowa, June 29, 1987).

Several bankruptcy courts have rejected arguments similar to that of the defendant. The Tambay Trustee, Inc. v. Florida Progress Corporation (In re Lawson), 67 B.R. 94, 96 (Bankr. M.D. Fla. 1986); Firestone v. Metropolitan Life Insurance Co. (In re Di Piazza), 29 B.R. 916, 922-23 (Bankr. N.D. Ill. 1983); Dumbaugh v. United Airlines, Inc. Pilots Directed Account Retirement Income Plan (In re McCormick), slip op. no. 86-0075C at 10-11 (Bankr. N.D. Iowa, June 29, 1987). In In re Di Piazza, the court ordered the turnover of the debtor's interest in the pension plan. The court held that the bankruptcy court's order requiring the pension plan to pay over the debtor's interest in an ERISA plan to the chapter 7 trustee did not disqualify the plan from receiving favorable tax treatment under 26 U.S.C. §401(a)(i3). In re Di Piazza, 29 B.R. at 923 (Bankr. N.D. Ill. 1983). The court held in In re Lawson, 67 B.R. at 96 (Bankr. M.D. Fla. 1986) that the tax consequences to the pension plan are irrelevant to determination of turnover under the Bankruptcy Code.

This court recognizes the concerns expressed by the defendant regarding the anti-alienation provisions of ERISA. However, the court is required to follow the dictates of the Bankruptcy Code. The retirement plan is property of the estate regardless of the tax consequences that may result. The court stated in In re McCormick, slip op. no. 83-0024 at 10 (Bankr. N.D. Iowa, June 29, 1987):

> The court does not believe Congress ever intended to adopt a statutory scheme which would allow pension benefits to be included in property of the estate but provide no mechanism by which the trustee can obtain the pension benefits for the benefit of creditors. If Defendants' position was adopted, all of the cases which hold ERISA-qualified pension benefits to be property of the estate would be rendered a nullity.

The ERISA anti-alienation provision should not prevent the trustee from a practical way to reach the funds which have been determined to be property of the estate. An ERISA-required anti-alienation provision does not preclude inclusion of pension benefits in a debtor's bankruptcy estate by operation of federal law. In re Graham, 726 F.2d 1268, 1273 (8th Cir. 1984). See also 29 U.S.C. §1144(a).

V.

The NADART plan is property of the debtor's estate. However, the issues of what property interests should be turned over and when and the value of that property must be determined after trial. A trial date shall be set by the clerk of court.

CONCLUSIONS OF LAW

The National Automobile Dealers & Associates Retirement Trust is not a "traditional" spendthrift trust under Virginia law.

Therefore, it is not excepted from property of the estate under 11 U.S.C. §541(c)(2). The debtor's interest in the retirement trust is property of the estate.

ORDER

1. IT IS ORDERED that the debtoris interest in the National Automobile Dealers & Associates Retirement Trust is property of the debtor's bankruptcy estate.

2. IT IS FURTHER ORDERED that National Automobile Dealers& Associates Retirement Trust's motion for summary judgment is denied.

3. IT IS FURTHER ORDERED that final trial regarding the turnover complaint will be set by the clerk's office.

SO ORDERED ON THIS 8th DAY OF JUNE, 1989.

William L. Edmonds
Bankruptcy Judge

---

1. The Honorable Michael J. Melloy.