

In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

KENNETH W. LEVITT and JAMALL
DARWISH LEVITT
Debtors.

Bankruptcy No. X88-00640S

Chapter 7

MEMORANDUM AND ORDER RE: OBJECTION TO DEBTORS' AMENDMENT

The matter before the court is the trustee's objection to the debtors' amended claims of exemption.

A hearing was held on August 29, 1989 in Sioux City, Iowa. The court now issues its findings of fact and conclusions of law as required by Bankr. R. 7052. This is a core proceeding under 28 U.S.C. § 157(b)(2)(B).

FINDINGS OF FACT

On or about March 28, 1986, Kenneth and Jamall Levitt left Iowa for California. At the time, they were renting an apartment in Lakeside, Iowa from Wayne Tatman under a month-to-month oral lease. When the Levitts left for California, their April rent was unpaid.

While the Levitts were in California, Tatman contacted a moving and storage firm and had it remove the Levitts' personal possessions from the apartment and place them in storage.

At the same time, Michael VunCannon was attempting to satisfy a judgment that he had obtained in Small Claims Court against Kenneth Levitt. On April 15, 1986, VunCannon directed the Buena Vista County sheriff to levy upon some of the Levitts' personal property. The sheriff's department served notice of the levy upon the moving and storage firm holding the property taken from the Levitts' apartment and initiated proceedings to publish and post notice of the sheriff's sale.

The Levitts' property was sold at a sheriff's sale on May 22, 1986. The sheriff's sale grossed \$1,729.68 of which \$571.48 was retained by the Buena Vista County Sheriff's Department for costs associated with the levy and sheriff's sale.

Upon their return to Iowa, the Levitts initiated proceedings against members of the Buena Vista County sheriff's office, Michael VunCannon, and Wayne Tatman for illegally seizing and selling their personal property.

On April 22, 1988, Kenneth and Jamall Levitt filed a joint voluntary petition under chapter 7 of the Bankruptcy Code. At this time, they listed their claims against Buena Vista County, the Buena Vista

sheriff and Tatman in Schedule B72(q) of their petition. They also listed these actions under § 10(a) of their Statement of Financial Affairs. However, the Levitts failed to list any of the items levied upon, the proceeds resulting from their sale; or the lawsuits mentioned above as exempt under Schedule B-4.

On October 25, 1988, the trustee of the Levitts' bankruptcy estate settled for \$500.00 the controversy between the Levitts and the Buena Vista County sheriff's office. On February 22, 1989, the Iowa District Court for Buena Vista County awarded the Levitts a judgment against Michael VunCannon for \$2,520.00, plus interest, less the settlement amount between the Levitts and the Buena Vista County sheriff's office.

Sometime prior to June 30, 1989, a settlement was reached in the action the Levitts were pursuing against their former landlord, Wayne Tatman. A settlement payment of \$1,000.00 was collected and held by Frank Cal Tenuta, a Legal Services attorney representing the Levitts in this action. On July 21, 1989, the trustee for the Levitts' estate received a check in the amount of \$725.35 from Tenuta; this was the amount of the settlement after the deduction of court costs and legal services fees.

On or about July 7, 1989, the Levitts amended their schedule of exempt property to include the \$500.00 settlement from the Buena Vista County sheriff's office, the \$1,000.00 settlement from Wayne Tatman, and any judgment proceeds that might arise out of the judgment against Michael VunCannon.⁽¹⁾ At trial before this court, the Levitts withdrew their claim to the VunCannon judgment. Further, they waived any right to amend their schedules again if any of the VunCannon judgment is collected.

Because the Iowa District Court in the Levitts' suit against VunCannon held that the property levied upon and sold by the Buena Vista County sheriff was exempt and worth less than \$2,000.00 (see plaintiffs' exhibit 1), the Levitts contend that the settlement proceeds arising out of these disputes should also be considered part of their exempt property. The Levitts claimed only \$450.00 worth of household goods as exempt property in their initial schedules. The approximately \$1,225.35.00 worth of settlement proceeds which the trustee now holds would still leave them well below the \$2,000.00 per debtor property limit permitted under Iowa Code § 627.6(5).

The trustee opposes the Levitts' motion to amend their Schedule B-4 on the grounds that their motion is not timely and that these proceeds are not exempt within Iowa Code § 627.6 or any of its subsections.

DISCUSSION

A. Exemption

The nature and extent of the debtors' interest in property are determined by state law. In re N. S. Garrott & Sons, 772 F.2d 462, 466 (8th Cir. 1985). However, once that determination is made, federal bankruptcy law dictates to what extent that interest is property of the estate. *Id.* at 466.

In Iowa, it is clear that upon a voluntary sale of exempt personal property, the proceeds of that sale are not exempt. First National Bank of Thornton v. Neve, 213 Iowa 344, 235 N.W. 561, 563 (Iowa 1931). In construing the status of the proceeds of exempt property, voluntarily sold, the Iowa Supreme Court stated:

The [exemption] statute does not say that he [the debtor] has a right to dispose of the property and hold the proceeds exempt from execution, but that he may hold the property . . . [T]he exemption ceases when he voluntarily lets go his hold upon the thing exempted.

In re Brogan's Estate, 177 Iowa 423, 157 N.W. 952, 954 (Iowa 1916).

Although law on the subject is extremely scarce, it follows that if exempt property is involuntarily sold, the proceeds of such an involuntary conversion should remain exempt. See 35 C.J.S. Exemptions 60 ("As a general rule, if exempt property is converted into property not exempt otherwise than by the voluntary act of the debtor, the other property may be claimed as exempt. Thus, where exempt property is wrongfully taken from a debtor by . . . execution or attachment, . . . a judgment recovered by him in an action for trespass, conversion, or other wrong, or the money collected on such judgment, is exempt.")

Bankruptcy courts also recognize the proceeds of exempt property as exempt and, therefore, as the property of the debtors, and not the trustee. Vullo v. Sheets (In re Sheets), 69 B.R. 542, 544 (Bankr. W.D. N.Y. 1987). The same is true with respect to the insurance proceeds of exempt property; absent fraud, debtors may amend their list of exemptions to include such proceeds. Payne v. Wood, 775 F.2d 202, 204-5 (7th Cir. 1985) cert. denied 475 U.S. 1085 (1986). See also Reynolds v. Haines, 83 Iowa 342, 49 N.W. 851, 852 (Iowa 1891).

Under 11 U.S.C. § 552(g), a debtor may exempt property that the trustee recovers to the extent that the debtor could have exempted such property under 11 U.S.C. § 522(b) if such property had not been transferred, if:

"(I)(A) Such transfer was not a voluntary transfer of such property by the debtor; and

(B) The debtor did not conceal such property.

11 U.S.C. § 522(g).

The holding of the Iowa District Court in the Levitts' action against Michael VunCannon makes it clear that the personal property sold at the Buena Vista County sheriff's sale on May 22, 1986 was exempt property under Iowa Code § 627.6(5). Therefore, this court presumes that the Levitts could have, and probably would have, exempted this personal property from their bankrupt estate had the property not been wrongfully sold. Consequently, if they may amend, the Levitts may exempt the proceeds of the Buena Vista County and Wayne Tatman settlements from the bankrupt estate.

B. Timeliness

Bankr. R. 1009(a) states that:

A voluntary petition, list, schedule, statement of financial affairs . . . may be amended by the debtor as a matter of course at any time before the case is closed.

Bankr. R. 1009 and its predecessor, Rule 110 of the old Federal Rules of Bankruptcy, have been liberally read by most courts to permit amendment anytime before the case is closed, absent a showing of the debtor's bad faith or of prejudice to the creditors. In re Zitteman, Bankruptcy No. 82-02400 (N.D. Iowa, May 8, 1986) at 3; In re Lawrence, Bankruptcy No. 81-00370 (N.D. Iowa, April 10, 1984) at 2-3. See also Stinson v. Williamson (Matter of Williamson), 804 F.2d 1355, 1358 (5th

Cir. 1986); Lucius v. McLemore, 741 F.2d 125, 127 (6th Cir. 1984). A trustee may not successfully claim detrimental reliance simply because of the passage of time between the petition or the creditors' meeting and the amendment. Tignor v. Parkinson, 729 F.2d 977, 979 (4th Cir. 1984); Doan v. Hudgins (Matter of Doan), 672 F.2d 831, 833 (11th Cir. 1982).

In the present case, the trustee has demonstrated no prejudice other than the passage of time and expenditures by the trustee in procuring some of the settlement proceeds. Because time, in and of itself, is not sufficient prejudice to deny amendment, and because the debtors have agreed to reimburse the trustee for his expenses in obtaining these proceeds,⁽²⁾

this court finds no prejudice and permits the amendment of schedule B-4 to include the proceeds of the settlements with the Buena Vista County sheriff's office and Wayne Tatman.

Because of the debtors' offer to reimburse the trustee for his expenses associated with the Tatman and sheriff's office settlements, the court will determine the required amount of the reimbursement. The trustee noticed 75 parties-in-interest of the sheriff's settlement, at a cost of \$1.00 per notice. There were no asserted costs with regard to the Tatman settlement and no reimbursement is required with regard to the VunCannon asset. The court declines to require payment to the trustee by debtors of an amount equal to the trustee's percentage fee applied to the sheriff's office settlement or the Tatman settlement.

ORDER

IT IS ORDERED that trustee's objection to the debtors' amendment to Schedule B-4 is overruled with respect to the \$500.00 settlement with the Buena Vista County sheriff's office and the remaining proceeds of the \$1,000.00 settlement with Wayne Tatman. The trustee's objection is sustained with respect to judgment proceeds arising out of the Michael Vun Cannon suit. The trustee shall turn over to the debtors the proceeds of the settlements with Tatman and the Buena Vista County sheriff's office less \$75.00.

SO ORDERED THIS 20th DAY OF SEPTEMBER, 1989.

William L. Edmonds
Bankruptcy Judge

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1. Each item was claimed exempt as household goods under Iowa Code § 627.6(5). The judgments against VunCannon and the settlement from Tatman were also claimed exempt under § 627.6(9)(c) as accrued wages and tax refunds.
 2. The debtors agreed at trial that if the court found the proceeds from Buena Vista County and Wayne Tatman settlements exempt, these proceeds should be taxed to reimburse the trustee for his expenses.