IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

IN RE:

DON ANDREA BROWN, BK #89-36292-WHB
Chapter 7

Debtor.

MEMORANDUM OPINION AND ORDER
ON TRUSTEE'S OBJECTION TO DEBTOR'S
CLAIMED EXEMPTION

At issue in this core proceeding[1] is whether the debtor's interest in his employer sponsored "Third Amended and Restated Employee Stock Ownership Plan and Trust Agreement" (hereinafter "employee plan") may be exempted or excluded from the debtor's bankruptcy estate. The following constitutes findings of facts and conclusions of law pursuant to Bankruptcy Rule 7052.

The issue has been submitted to the Court as a question of law to be resolved based upon the oral arguments of counsel and exhibits consisting of the employee plan (Tr. Exhibit 1); Internal Revenue Service letter (Tr. Exhibit 2); and Summary of Account (Tr. Exhibit 3).

According to counsel for the Trustee, this issue arose when the debtor, on his Chapter 7 Statement of Financial Affairs and Schedules, claimed his interest in the employee plan as exempt with a value of zero. At the same time, the debtor listed his interest on Schedule B-2, which provides for assets owned, as "only available if job terminated" with a value of $9,000.00. It is essentially the Trustee's position that this interest is property of the estate which is not exempt under Florida or federal law. It is the debtor's position that his interest qualifies as an interest excluded from property of the estate by virtue of 11 U.S.C. §541(c)(2) or, in the alternative, that it is exempt under Florida or federal law.

[1] 28 U.S.C. §157(b)(2)(A)(B) and (O).

It is well settled that in order to be excluded from property of the estate, which includes all legal and equitable interests of the debtor as of the commencement of the case pursuant to §541(a)(1), the interest at issue must fall within the parameters of §541(c)(2), providing as follows:

> (2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

The majority of courts considering this section, including this court, have held, in reliance on the legislative history, that §541(c)(2) refers to trusts which qualify as spendthrift trusts under state law. In re Harkins, unpub., BK. #88-24246-B, Adversary Proceeding #88-0260 (Bankr. W.D. Tenn., Feb. 21, 1989); In re Swanson, 873 F. 2d 1121 (8th Cir. 1989); In re Brooks, 844 F. 2d 258 (5th Cir. 1988); In re McDonald, 100 B.R. 598 (Bankr. S.D. Fla. 1989). Indeed, this is the law of the Eleventh Circuit. In re Lichstrahl, 750 F. 2d 1488, 1490 (11th Cir. 1985) ("We too hold that 'applicable nonbankruptcy law' refers only to state spendthrift trust law.") Emphasis added.

Thus, the issue becomes whether the debtor's interest in the employee plan qualifies as a spendthrift trust under Florida law. According to the Eleventh Circuit,

> Florida law recognizes and enforces as spendthrift trusts those trusts:
>
> > that are created with a view of providing a fund for the maintenance of another, and at the same time securing it against his own improvidence or incapacity for self protection. The provisions against the alienation of the trust fund by the voluntary act of the beneficiary, or invitum by his creditors are the usual incidents of such trusts.

In re Lichstrahl, 750 F. 2d 1490, quoting, Croom v. Ocala Plumbing & Electric Co., 62 Fla. 460, 465, 57 So. 243, 244 (1911). Clearly from this language, a spendthrift trust under Florida law is one which is created by one other than the beneficiary, contains an alienation clause, and affords the beneficiary no present control over or right to distribution from the trust.

The employee plan at issue here is created by one other than the beneficiary given the following language of its Article 5,§1: "All contributions under the plan shall be made by the Company and no contribution shall be required of or permitted by any participant." (Tr. Ex. 1) In addition, the plan contains the following alienation provision:

> 21.9 Except as otherwise provided in Section 14.10, the interests of participants and beneficiaries in the Trust may not be in any way sold, assigned, alienated, transferred, charged, hypothecated, pledged, encumbered or anticipated and shall not be subject to be taken, either voluntarily or involuntarily, for the payment of their debts or other obligations, or for claims against them for alimony, support or separate maintenance; provided, however, that nothing hereinabove set forth shall prohibit or limit the payment of any amounts held for a Participant's benefit in accordance with the applicable requirements of any qualified domestic relations order as defined in Section 414(p)(1)(A) of the Code.

(Tr. Ex. 1; Amendment #3)

These aspects obviously favor a finding that the plan qualifies as a spendthrift trust. However, the plan further provides that the benefits are vested immediately for "qualifying participants."[2] (Ex. 1) In addition, Article 14,§10 of the plan entitles any participant to make application for and, if approved, obtain a loan in an amount not to exceed $50,000.00, or the greater of 50% of the participant's account or $10,000.00. There is no requirement that the participant have any particular need for such a loan, e.g., buying a home or educational expense. The availability and amount of a loan is apparently only dependent upon the value of the participant's interest in the plan and approval of an application. Should the borrowing participant default on the loan, assets of his interest in the plan will be liquidated in an amount necessary to repay the loan in full. (Tr. Ex. 1; Amendment 1).

As set forth above, this section 14.10 is specifically excluded from the alienation provisions. Consequently, there is, at least to the extent of 50% of the debtor's interest or $10,000.00, no "provision against alienation of the trust fund by the voluntary act of the beneficiary" as required for a spendthrift trust under Florida law. In re Lichstrahl, 750 F. 2d 1490. This conclusion is further supported by those cases which hold that the ability to obtain loans from such a plan demonstrates sufficient control over the plan funds

[2] Presumably, the debtor here is a "qualified participant" given that he in fact has an interest in this plan.

to place the plan outside the realm of a spendthrift trust. In re Harkins, supra; In re Cassada, 86 B.R. 541 (Bankr. E.D. Tenn. 1988); In re Nichols, 42 B.R. 772 (Bankr. M.D. Fla. 1984).

Therefore, to the extent that the debtor can borrow against his interest in the plan, it may be said that he controls that portion of his interest and, as such, it does not qualify as a spendthrift trust.

This brings us to the balance of the debtor's interest, which is not subject to loan privileges, and whether it qualifies as a spendthrift trust. Obviously, from the above discussion, this portion of the debtor's interest has been created by employer contributions and is subject to the alienation provisions previously set forth. Thus, the critical inquiry is what, if any, control the debtor may exercise over this remaining portion of the trust.

The employee plan itself provides that benefits are payable only to retired, disabled, or terminated participants or their beneficiaries. (Tr. Ex. 1; ¶9.1) Payments are required to begin no later than the "first day of April of the calendar year following that . . . year in which the later of the following occurs:" the participant reaches 70 1/2 years of age or terminates his employment. (Tr. Ex. 1, Amdmt. #3)

According to the bankruptcy courts which have applied the Florida law of spendthrift trusts in this context, the fact that the debtor cannot compel distribution of the plan funds except upon occurrence of one of the above events, places those funds within the protection of Florida's spendthrift trust laws. Under this line of cases, interests such as the debtor's to which he has no access absent termination of his employment, are excludable from property of the bankruptcy estate. See, In re Zabelski, 81 B.R. 89 (Bankr. N.D. Fla. 1988); In re Monahan, 68 B.R. 997 (Bankr. S.D. Fla. 1987); In re Forbes, 65 B.R. 58 (Bankr. S.D. Fla. 1986).

Having concluded that the debtor's interest in the employee plan above that amount which is available for loans is excludable from property of the estate, the court will next consider whether the debtor's interest which is property of the estate may be exempted by the debtor and placed beyond the reach of the trustee.

Florida is an "opt-out" state with respect to exemptions. In other words, the exemptions specifically made available by §522 of the Bankruptcy Code are not available to Florida debtors. Rather, pursuant to the authority of §522(b)(2)(A), Florida has chosen to make "any property that is exempt under Federal law, other than [that enumerated in §522(d)], or state or local law" available for exemption by Florida debtors.

It is the debtor's position that his entire interest in this plan is exemptible pursuant to Fla. Stat. §222.21(2)(a) and the recent holding in In re Martinez, 107 B.R. 378 (Bankr. S.D. Fla. 1989). It is the Trustee's position that Fla. Stat. §222.21(2)(a) is of no effect in light of the recent U.S. Supreme Court case, Mackey v. Lanier, 486 U.S. 825, 108 S. Ct. 2182, 100 L. Ed. 2d 836 (1988), wherein that Court held that state laws which "relate to" Employee Retirement Income Security Act of 1974 (ERISA) qualified plans are preempted by the terms of ERISA. In addition, the Trustee questions whether the plan at issue is in fact an ERISA qualified plan.

Fla. Stat. §222.21(2)(a) provides:

> 2(a) Except as provided in paragraph (b), any money or other assets payable to a participant or beneficiary from, or any interest of any participant or beneficiary in, a retirement or profit sharing plan that is qualified under §401(a), §403(a), §408, or §409 of the Internal Revenue Code of 1986, as amended, is exempt from all claims of creditors of the beneficiary or participants.

In considering this statute in light of the Mackey case, supra, the Martinez Court determined that inasmuch as the Florida statute does not purport to "regulate" any matters dealing with ERISA plans, it does not "relate to" them within the meaning of Mackey and, thus, is not preempted by ERISA. 107 B.R. at 380.

However, under the facts and circumstances of this case, as well as examination of the Mackey opinion and ERISA sections discussed therein, it is not necessary to address the issue of whether the Florida statute is preempted in this case.

This is because §522(b)(2)(A) of the Bankruptcy Code provides for the exemption of property exemptible under other federal laws as well as state and local laws. In this case, other federal law is ERISA which provides in no uncertain terms that the benefits provided under a qualified pension plan shall not be assignable or alienable. 29 U.S.C. §1056(d). Moreover, although the Mackey Court concluded that benefits provided under employee welfare benefit plans[3] are subject to alienation, in particular, garnishment, it sets forth with equal clarity that benefits provided under pension or retirement plans[4] are not so subject. 486 U.S. at 836.

Accordingly, given the language of 11 U.S.C. §522(b)(2)(A) which provides for the availability of other federal exemptions, coupled with the alienation language of 29 U.S.C. §1056(d) and the Supreme Court's interpretation thereof, if the plan at issue is an ERISA qualified pension plan, the benefits thereunder would appear to be available for exemption by this debtor. The Court notes that Mackey, supra, is subsequent to Lichstrahl, supra. In Lichstrahl the Eleventh Circuit followed In re Goff, 706 F. 2d 574, 585 (5th Cir. 1983) in holding that Congressional omission, in House and Senate reports on §522(b)(2)(A), of ERISA-qualified pension plans was "intentional." 750 F. 2d at 1488. Therefore, Lichstrahl concluded that the debtor could not exempt such pension plans under §522(b)(2)(A). Goff, supra, has been criticized. See, In re Komet, 104 B.R. 799 (Bankr. W.D. Tex. 1989); see generally, Sterbach, Weiss and Salerno, "Pre-Bankruptcy Planning for Professionals and ERISA Qualified Pension Plans: Are State Created Statutory Exemptions

[3] "Employee welfare benefit plans" are defined at 29 U.S.C. §1002(1) as "any plan, fund, or program . . . maintained for the purpose of providing for its participants . . . (A) medical, surgical, or hospital care benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal expenses, or (B) any benefit described in §302(c) of the Labor Management Relations Act, . . . (other than pensions or retirement or death and insurance to provide such pensions)." Emphasis added.

[4] 29 U.S.C. §1002(2)(A) defines "'Employee pension benefit plan' and 'pension plan' to mean any plan, fund, or program . . . to the extent that . . . [it]

(i) provides retirement income to employees or,
(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, . . . "

D.O.A. In Bankruptcy Proceedings?," 94 Com. L.J. 229 (Fall 1989). Mackey was not a bankruptcy case, but clear language of Mackey as to pension and retirement plans appears to be in conflict with the Lichstrahl holding.

There is no proof in the record to indicate that this plan is anything other than a pension plan within the meaning of ERISA. To the contrary, the plan is designed to provide benefits upon termination of employment. It contains no language which would render it an employment welfare benefit plan.

Thus, the issue becomes whether the plan is a "qualified" pension plan under ERISA. The trustee raised some question about this issue at the hearing on this matter, contending that a 1985 opinion letter from the Internal Revenue Service as to the plan's qualification is not sufficient to show that it remains a qualified plan. (Tr. Ex. 2) However, the Trustee introduced no evidence to support a finding that the plan is not so qualified. Accordingly, the plan at issue would be subject to complete exemption by the debtor, except for the Lichstrahl holding. Until the Eleventh Circuit or the Supreme Court considers Mackey in a bankruptcy context, this Court feels obliged to follow Lichstrahl.

From the above findings of fact and conclusions, it is **HEREBY ORDERED** that:

The Trustee's objection to the debtor's claimed exemption of his interest in his employer sponsored stock purchase plan is **SUSTAINED** as to that portion which is available for loans to the debtor.[5] However, as to that portion of the plan which is not available for loans, such amount is a spendthrift trust and is not property of this estate.

SO ORDERED this 7th day of May, 1990.

WILLIAM HOUSTON BROWN
UNITED STATES BANKRUPTCY JUDGE
By Assignment

[5] The Court is aware that the debtor has already borrowed some funds; therefore, the difference in the amount borrowed and the maximum subject to loans is not exempt.

cc:

Gail M. Dauber, Esq.
Attorney for Debtor
One Financial Plaza
Suite 2600
Fort Lauderdale, Florida 33394

Ronald Lewis, Esq.
Attorney for the Trustee
Post Office Drawer 3948
West Palm Beach, Fla. 33401

Mr. Don A. Brown
Debtor
4013 B Woods Edge Circle
Palm Beach Gardens, Fla. 33410