

Dated: June 22, 2006
The following is ORDERED:





Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re

JO C. SMITH,

Debtor.

Case No. 03-24166-L
Chapter 7

ORDER DENYING MOTION TO AMEND SCHEDULE C EXEMPTIONS

BEFORE THE COURT is the motion of Jo C. Smith, Debtor, seeking to amend Schedules B and C and her Statement of Financial Affairs to declare her interest in a class-action lawsuit against the manufacturer and distributor of a weight loss drug known as Phen-Fen, and to claim a portion of her interest to be exempt from the claims of creditors pursuant to Tennessee Code Annotated § 26-2-111(2)(B). The court heard testimony in connection with the Debtor's motion on May 11, 2006. After carefully considering the testimony, the evidence, and the arguments of counsel, the court makes the following findings of fact and conclusions of law. This is a core proceeding. 28 U.S.C. § 157(2)(B).

FACTS

The Debtor filed her voluntary petition under Chapter 7 of the Bankruptcy Code on March 11, 2003. There is no mention of the Debtor's Phen-Fen claim in any of the documents filed by the Debtor in connection with her bankruptcy case. George W. Stevenson was appointed trustee. The Debtor received a discharge on July 14, 2003. On February 22, 2006, the Trustee filed a motion to reopen the case, alleging that he had discovered an unreported asset. This asset was the Phen-Fen lawsuit. The Trustee's motion was granted on March 29, 2006. The Trustee gave notice to all creditors to file claims, and the Debtor filed her motion to amend her schedules and statement of financial affairs on April 12, 2006.

The Debtor testified that she had engaged counsel to represent her with respect to the Phen-Fen litigation prior to the filing of her bankruptcy petition, and that she discussed this litigation with her attorney prior to filing her petition, but that the lawsuit was not listed in her schedules because, when she reviewed her petition and schedules prior to filing, the litigation that was on her mind was her pending divorce, not the Phen-Fen lawsuit. The Debtor claims that this was merely an oversight and asks that she be permitted to amend her schedules now and claim the exemption provided by state law.

On cross-examination, it was revealed that the Debtor entered into a written contingency fee contract with certain attorneys in Greenville, Mississippi, on June 27, 2001, and that she received written correspondence from an attorney on December 15, 2002, just three months prior to the filing of her petition, informing her that a medical test related to the Phen-Fen claim had been scheduled on her behalf. Prior to the filing of her case, the Debtor completed a Client Information Worksheet at the request of her attorney, which does not make reference to the Phen-Fen claim or the contract

for legal services. At the first meeting of creditors, the Debtor completed a questionnaire in which she affirmatively states that she read the bankruptcy papers prepared by her attorney and that all the information, other than a certain inaccuracy in Schedule D, was correct. Subsequent to the meeting of creditors, the Debtor continued to receive correspondence from her attorneys concerning the Phen-Fen claim, but at no time did she bring this information to the attention of the Trustee. Ultimately, the Debtor received a letter dated November 8, 2005, indicating that a final proposed settlement had been reached in the class action lawsuit, and that her gross settlement award under the proposed settlement would be \$18,394.42.

The Trustee testified that he had no indication of the Debtor's interest in the Phen-Fen litigation until he received a letter on February 6, 2006, from a law firm in Alexandria, Virginia, well after the case was closed. He further testified that, under the terms of the proposed settlement, the net recovery to the bankruptcy estate would be \$9,197.21, and thus that allowing the Debtor to claim \$7,500.00 of these proceeds as exempt would be prejudicial to creditors. The Trustee asks that the motion be denied.

ANALYSIS

Generally, amendments to bankruptcy schedules are liberally allowed. Bankruptcy Rule 1009(a) permits the amendment of a voluntary petition, list, schedule or statement by the debtor as a matter of course at any time before the case is closed. Fed. R. Bankr. P. 1009(a). This case, however, was closed prior to the attempted amendment by the Debtor. Thus, technically, the Debtor's attempted amendment is late. Furthermore, the court may refuse to allow an amendment where the debtor has acted in bad faith or where property has been concealed. *Lucius v. McLemore*, 741 F.2d 125, 127 (6th Cir. 1984); *In re Lundy*, 216 B.R. 609, 610 (Bankr. E.D. Mich. 1998).

The court can only conclude that the Debtor deliberately failed to list her Phen-Fen claim. The Debtor testified that she discussed this claim with her attorney prior to the filing of her case, yet there is no mention of it in the Client Information Worksheet she prepared or in the schedules and statement of financial affairs she signed. Even if the Debtor had forgotten to list the claim on the worksheet, the court would expect that some note of the claim would have been made in the course of her interview with her attorney. There are certain handwritten notes on the worksheet, in a handwriting that appears to be different from that of the Debtor, but no note concerning the Phen-Fen claim. Further, had the Debtor discussed this claim with her attorney, the court would have expected the attorney to remember it, even if the Debtor did not, at the meeting of creditors. This did not happen either, notwithstanding the Trustee's questions. At no time did the Debtor bring her Phen-Fen claim to the attention of the Trustee, even when she was notified of the pending settlement. Rather, the Trustee learned of the claim from a third party and moved to reopen the case to administer the asset. Only then did the Debtor seek to amend her schedules to claim the exemption. Under these circumstances, the court finds that the Debtor acted in bad faith and attempted to conceal this asset from the Trustee. Accordingly, the motion to amend exemptions is **DENIED.**

cc: Debtor
Debtor's Attorney
Case Trustee
Attorney for Case Trustee
United States Trustee