

**UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

In re:	*	
	*	Case No. 03-38117
Jeffrey J. and Kristi L. Brooks,	*	
	*	Chapter 7
Debtors.	*	
	*	Judge William A. Clark

**MEMORANDUM DECISION DENYING DEFENDANTS'
MOTION TO DISMISS ADVERSARY PROCEEDING AND
MOTION TO DISMISS TRUSTEE'S OBJECTION TO EXEMPTION**

Dated at Dayton, Ohio this 12th Day of May, 2005:

This matter is before the court on documents filed in the Debtors' main bankruptcy case and this Adversary Proceeding. This decision will be filed and have effect in both proceedings. The various issues before the court stem from one particular asset associated with Debtor Kristi L. Brooks, the proceeds of the Kennard-Geddes Trust (the "Trust Receipts").

The court has jurisdiction over this matter pursuant to 28 U.S.C. § 157 and 1334 and the standing order of reference entered in this district. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

I. Procedural Background

The Debtors filed a petition for Chapter 7 bankruptcy on September 17, 2003. The Debtors' schedules were properly filed with the petition. The schedules mention the Trust as an asset and a source of income but do not specifically indicate that the Debtors intend to claim an exemption with regard to the Trust or the Trust Receipts. The Debtors provided an addendum to Schedule C that lists all of their exemptions under Ohio state law. Although that list includes the "wild card" exemption under O.R.C. § 2323.66(A)(17), it fails to specifically identify any exemption with regard to the Trust or the Trust Receipts. The meeting of creditors was held on November 6, 2003 and a discharge was granted on January 24, 2004.

On February 12, 2004, the Trustee filed her first interim report on the assets in the case. That report contained the following statement regarding the Trust and Trust Receipts: "On January 12, 2004, the Trustee sought additional documentation form [sic] the Debtors with regard to the Kennard-Geddes Trust." [Doc. # 9.] On May 28, 2004, the Trustee issued a subpoena to an officer of Unizan Bank f/k/a First National Bank of Zanesville seeking any and all information on the Trust.

On October 14, 2004, the Trustee filed an application to employ Lee A. Slone as attorney for the Trustee. In the description of professional services to be provided by counsel, the application stated that counsel would "institute any appropriate proceeding to recover the debtor's interest or the value thereof in the principal and income from the Kennard-Geddes Trust" [Doc. # 13.] The application to employ counsel was approved on November 12, 2004.

On December 21, 2004, the Trustee instituted Adversary Proceeding 04-3350 by filing a complaint against Kristi L. Brooks and Unizan Bank. The complaint alleged that Kristi L. Brooks had received proceeds of the Trust post-petition and requested turnover of those proceeds and any and all future proceeds of the Trust. On December 28, 2004, the Debtors filed an answer to the complaint which generally denied all the allegations of the complaint. The answer also included a motion to dismiss arguing that the complaint was inappropriate and time-barred because an objection to a claimed exemption must be brought within thirty (30) days of the meeting of creditors under Bankruptcy Rule 4003.

On January 12, 2005, the Trustee filed a response to the motion to dismiss arguing that the motion to dismiss was misplaced because the Debtors had never claimed an exemption in the Trust Receipts. Despite that filing, the Trustee also filed an objection to the Debtors' claim of exemption in the main bankruptcy on January 25, 2005. The Debtors then filed a motion to dismiss in the main bankruptcy in which they argued that the objection to exemption should be dismissed because the objection was not timely filed.

On March 3, 2005, the court held a conference in which the parties discussed the relevant issues. At the conclusion of the conference, the Debtors requested additional time to file a supplemental memorandum on the issue of dismissal of the adversary proceeding and the objection to exemption.

The supplemental motion to dismiss was, appropriately, filed on April 1, 2005 in the main bankruptcy case. The Trustee filed a response to the supplemental motion on April 25, 2005. Finally, the Debtors filed a copy of the supplemental motion to dismiss in this Adversary Proceeding on April 29, 2005.

The motions and responses currently before the court, therefore, are the Motion to Dismiss contained in the Debtor's Answer in the Adversary Proceeding, [Adv. Pro. Doc. # 4], the Response to the Motion to Dismiss contained in the Debtor's Answer in the Adversary Proceeding, [Adv. Pro. Doc. # 7], the Supplemental Motion to Dismiss filed in the bankruptcy case, [Doc. # 22], the Response to the Supplemental Motion to Dismiss filed in the bankruptcy case, [Doc. # 23], and the extraneous Supplemental Motion to Dismiss filed in the Adversary Proceeding, [Adv. Pro. Doc. # 15].

II. Discussion

The Debtors request the dismissal of two separate proceedings in their supplemental briefs. The first is the Adversary Proceeding itself and the second is the Objection to Exemption filed by the Trustee in the main bankruptcy case. The court will address the latter first.

A. Dismissal of the Objection to Exemption

The Trustee filed the objection to exemption in January 25, 2005 after it became clear from the Debtors' answer in the Adversary Proceeding that the Debtors were arguing that they had claimed an exemption in the Trust Receipts. The objection, however, was superfluous and any dismissal of the objection would also be superfluous.

The proper method of claiming an exemption to the Trust Receipts is to claim that exemption on the schedules filed with the bankruptcy petition. Debtors have the burden of listing exemptions and any ambiguity in the schedules will be construed against them. See In re Moore, 175 B.R. 13, 15 (Bankr. S.D. Ohio 1994). Since no indication of an exemption in the Trust or the Trust Receipts can be found in the original schedules filed by the Debtors, the court finds no exemption was claimed. If the Debtors intend to claim such an exemption, an amendment to the schedules is necessary.

Since the Debtors have not claimed an exemption in the Trust Receipts, then the Trustee's objection is untimely and a nullity. The Debtors' request for dismissal of the objection is also a nullity and will be denied. If, in the future, the Debtors attempt to and succeed in amending their schedules to include an exemption for the Trust Receipts, then the court will accept the Trustee's objection as valid and the parties will move forward with litigation involving the exemption—litigation in which the Trustee will have the burden of proving that the exemption is inappropriate.

B. Dismissal of the Adversary Proceeding

The Debtors' second request is that the Adversary Proceeding regarding the Trust Receipts be dismissed because the Trustee failed to file the complaint within the time period allowed for an objection to an exemption. The Debtors apparently set forth the following two-tiered argument.

First, the Trustee knew or should have known that the Debtors were claiming an exemption in the Trust Receipts as early as the meeting of creditors in November 2003. If that were the case, then the Trustee should have objected to the claimed exemption with thirty (30) days of the meeting of creditors under Bankruptcy Rule 4003. Thus, the Debtors argue that since the Trustee did not object to the exemption within that thirty (30) day window, then the Trustee's suit for turnover of the Trust Receipts should be dismissed.

This argument fails. As noted above, the Debtors simply did not claim an exemption in the Trust Receipts. Although a review of the record shows that the Trustee was aware of the Trust as early as February 2004, there was no way for the Trustee to determine that the Trust Receipts were being claimed as exempt at that time. It is not the responsibility of the Trustee to assume or guess at the exemptions claimed by the Debtors. Conversely, it is the absolute duty of

the Debtors to report, with specificity, the exemptions claimed in the schedules filed with the bankruptcy petition.

The second part of the Debtors' argument relies on the fact that the Trustee retained counsel in order to proceed against the assets of the estate. The argument apparently stems from the Debtors' interpretation of this court's ruling in the reported case In re Zimmer, 154 B.R. 705 (Bankr. S.D. Ohio 1993). The Zimmer decision provided an interpretation of the Supreme Court case Taylor v. Freeland & Kronz, 503 U.S. 638 (1992) which held generally that objections to exemptions must be filed within thirty (30) days of the meeting of creditors.

In Zimmer, the trustee brought a turnover action against the tax refunds of husband and wife debtors. The trustee, however, had not filed a timely objection to the claimed exemptions. In the case of the wife, an exemption had been claimed in the non-specific category of "other property." While the court found that the "other property" category did not give the trustee sufficient notice to immediately file an objection to the exemption in the tax refund, the court did find that the trustee had notice of the claimed exemption from the time of the application for appointment of counsel. The court's decision was based on specific language within the application stating that the trustee would determine whether the tax refund was properly exempt. Thus, the court found that the trustee was on notice of the claimed exemption from the date that the application for appointment of counsel was filed. The trustee in the Zimmer case never filed an objection to the exemption and filed the turnover proceeding nearly two years after the application for appointment of counsel had been filed.

Applying the Zimmer case to the case at hand, the Debtors appear to argue that the thirty (30) day time frame for filing an objection to the Debtors' exemption in the Trust should run from the date that the Trustee filed her application for employment of counsel. According to the

Debtors, this case is identical to Zimmer and the court should prohibit the Trustee from proceeding with this turnover action.

Once again, however, the Debtors' argument fails. The issues of this case, although similar to Zimmer, are not identical. In Zimmer, the trustee's application for employment of counsel stated specifically that counsel was obtained to evaluate the refund and determine whether and to what extent the refund was exempt. The Trustee's application in this case did indicate that the Trust was at issue, but not that an exemption was claimed. Nothing indicates that the Trustee was aware of the claimed exemption. In Zimmer, it was apparent from the application that a claimed exemption would be at issue.

In addition, the Trustee in this case did not wait two years to file the action for turnover as the trustee did in Zimmer. In this case, once the Trustee obtained counsel, litigation regarding the Trust commenced expeditiously.

Finally the court returns to the basic premise set forth in this ruling. The Debtors had the burden of indicating a claimed exemption in the Trust or the Trust Receipts. The schedules in this case provide no hint whatsoever that an exemption in the Trust was intended to be claimed. The Trustee is not expected to guess at the exemptions claimed. And the Debtors have provided no evidence indicating that the Trustee knew of the claimed exemption prior to filing the complaint in this Adversary Proceeding.

The first time the Trustee became aware that an exemption was claimed in the Trust Receipts was when the Debtors answered the complaint on December 28, 2004, after the Trustee had instituted this Adversary Proceeding. Because there is no evidence showing that the Trustee knew of the claimed exemption prior to filing the complaint and the Debtors did not specifically

claim that the Trust Receipts were exempt, the court denies the Debtors' motion to dismiss this Adversary Proceeding.

III. Conclusion

This matter is before the court on two separate issues based in the same legal analysis. First, the Debtors move that this Adversary Proceeding be dismissed and, second, that the Trustee's objection to exemption be dismissed. Both motions argue that the Trustee did not act in a timely manner with regard to the Debtors' claimed exemption in the proceeds of the Kennard-Geddes Trust. The court finds that no exemption has been claimed. The schedules did not specifically identify such an exemption, and the Debtors first identified the exemption in writing on December 28, 2004 in their answer in this Adversary Proceeding. In order to claim such an exemption, the Debtors must amend their schedules.

It is therefore **ORDERED, ADJUDGED, AND DECREED**, that:

- (1) The Trustee's Objection to Exemption was superfluous and dismissal is not warranted. The Debtors' motion to dismiss the objection is denied.
- (2) The Debtors' motion to dismiss this Adversary Proceeding is denied.

It is so ordered.

cc:

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