UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	) CASE NO. 01-50332
	)
Valerie E. Flynn,	) CHAPTER 7
	)
DEBTOR.	) JUDGE MARILYN SHEA-STONUM
	)
	)
	)
Harold A. Corzin, Trustee,	) Adv. Pro. No. 03-5232
	)
Plaintiff,	) MEMORANDUM OPINION RE:
	) CROSS MOTIONS FOR SUMMARY
v.	) JUDGMENT
	)
Valerie E. Flynn, et al.,	)
	)
Defendants.	)

This matter is before the Court on the Motions of Defendant Valerie Flynn (the "Debtor" or "Ms. Flynn") and William Flynn ("Mr. Flynn") for Summary Judgment [docket ## 29 and 31, respectively], Plaintiff Harold A. Corzin's (the "Plaintiff" or the "Trustee") Memorandum in Support of Judgment for the Plaintiff (sic) (the "Cross-Motion") [docket # 30] and the Defendants' Responses to the Cross-Motion [docket ## 32 and 33].

In his Complaint, the Trustee asserts two claims for relief: (1) a claim for turnover against Mr. Flynn for funds withdrawn from Mr. Flynn's 401(k) in which Ms. Flynn was granted an interest prior to the Petition Date (defined below), pursuant to the terms of the Flynn's Divorce Decree (defined below) and (2) a claim for turnover against Ms. Flynn. The Defendants argue, in their motions and responses, that the Trustee is not entitled to the funds because the funds are not property of the Debtor's bankruptcy estate. The Trustee did not file

a response to the Defendants' Motions for Summary Judgment.

JURISDICTION

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. It is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (E), and (O) over which this Court has jurisdiction pursuant to 28 U.S.C. § 1334(b). Based upon the facts of record in this case, the pleadings on file in this adversary proceeding, the Stipulations of Fact filed on April 2, 2004 [docket # 18] and on May 18, 2004 [docket #27], as amended on July 19, 2004 [docket ##34 and 35](collectively the "Stipulations"), the Affidavit of Mr. Flynn, and the Affidavit of Ms. Flynn, the Court notes the following uncontested facts and reaches the following conclusions of law.

STIPULATED FACTS and FACTS SET FORTH IN UNCONTROVERTED AFFIDAVITS

On February 13, 2001 (the "Petition Date"), Ms. Flynn filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code. *See* Stipulations, ¶ 1. Harold Corzin was duly appointed, qualified and is presently acting as Trustee of the Debtor's estate. *See* Stipulations, ¶ 1.

Prior to the Petition Date, on December 3, 1999, in the case of *Flynn v. Flynn*, Case No. 262318 (the "Divorce Case"), the Cuyahoga County, Ohio Court of Common Pleas Division of Domestic Relations ("State Court") entered a decree, which incorporated the terms of a previously executed separation agreement, granting a divorce to Mr. Flynn and Ms. Flynn (the "Divorce Decree"). *See* Stipulations ¶ 2. Pursuant to the terms of the Divorce Decree Ms. Flynn was entitled to receive the interest of Mr. Flynn in a certain 401(k) plan (the

"Plan") which on June 30, 1999 had a value of $18,964.20. *See* Stipulations, ¶ 3. Specifically, the Divorce Decree provides in paragraph 5 of the separation agreement,

> The parties also acknowledge that the Husband has a 401(K) plan through his employer, LTV Steel - USWA (Fidelity Investments). The parties acknowledge that said 401(K) plan had a value of Eighteen Thousand Nine Hundred Sixty-Four Dollars and Twenty Cents ($18,964.20) as of June 30, 1999.
>
> The Husband shall transfer the entire plan to the Wife within Ten (10) days of execution of this Agreement so as to attain an equal division of property...

According to the Affidavit of Mr. Flynn, on or about May 11, 2000, a document captioned a Qualified Domestic Relations Order ("QDRO") was signed and filed in the State Court in the Divorce Case. *See* Affidavit of Mr. Flynn, ¶ 2.

Prior to the Petition Date, no distribution was made to the Debtor from the Plan on account of the QDRO or otherwise. *See* Stipulations, as amended, ¶ 9. On the Petition Date, Mr. Flynn was an employee of LTV Steel Co. *See* Stipulations, as amended, ¶ 8. His last day of employment with LTV Steel Co. was November 8, 2001. *See* Stipulations, as amended, ¶ 8.

According to the Affidavits of Mr. Flynn and Ms. Flynn, after the Petition Date, by letter dated March 23, 2001, the Plan administrator requested that the parties make certain revisions to the QDRO. *See* Affidavit of Mr. Flynn ¶ 3 and Affidavit of Ms. Flynn ¶ 2.

After the Petition Date, on September 19, 2001, Mr. Flynn borrowed approximately $4,000 from the Plan. *See* Stipulations, as amended, ¶¶ 4 and 9. According to the uncontroverted Affidavit of Mr. Flynn, the money borrowed by him was used to payoff a note (the "Note") owed to Park National Bank and secured by a 1996 Ford Sable (the "Car") that

was awarded to Ms. Flynn in the Divorce Decree. *See* Affidavit of Mr. Flynn, ¶¶ 5 and 6, and Divorce Decree, separation agreement, page 4.

In May, 2003, Mr. Flynn withdrew the remaining amount ($6,236) in the Plan. *See* Stipulations, as amended, ¶¶ 4 and 9. After payment of backup withholding, the net amount of $4,898.09 was disbursed to Mr. Flynn and delivered by him to Ms. Flynn. The funds are being held in escrow in the account of Julie Rabin, attorney for Debtor Ms. Flynn. *See* Stipulations, ¶¶ 6 and 7.

DISCUSSION

Summary Judgment Standard

A court shall grant a party's motion for summary judgment "if...there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); FED. R. BANKR. P. 7056.

> Under Rule 56(c), summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

DiCarlo v. Potter, 358 F.3d 408, 414 (6th Cir. 2004). The party moving for summary judgment bears the initial burden of showing the court that there is an absence of a genuine dispute over any material fact, *Searcy v. City of Dayton*, 38 F.3d 282, 286 (6th Cir. 1994) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)), and, upon review, the court should draw all reasonable inferences in favor of the nonmoving party. *DiCarlo v. Potter,* 358 F.3d at 414; *Searcy v. City of Dayton*, 38 F.3d 282, 285 (6th Cir. 1994); *Boyd v. Ford Motor Co.*, 948 F.2d 283, 285 (6th Cir. 1991). A material fact is one that must be decided before there can be a

resolution of the substantive issue that is the subject of the motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

When a motion for summary judgment is made and supported by affidavit or otherwise,

> an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Bankruptcy Rule 7056(e).

On cross-motions for summary judgment, "the Court must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." *BF Goodrich Co. v. United States Filter Corp.*, 245 F.3d 587, 592 (6th Cir. 2001).

The Trustee's Cross Motion for Summary Judgment

The Trustee argues that based on the Divorce Decree Mr. Flynn owed the Debtor a "debt on the date of the filing of the petition for the monies which he had previously converted" and owed a debt to the Debtor for the balance of the funds in the Plan on the Petition Date. According to the Trustee, these debts owed by Mr. Flynn to Ms. Flynn constitute property of the estate pursuant to Bankruptcy Code § 541. The Trustee bases these assertions, in large part, on the language in the Divorce Decree requiring "the Husband to transfer the entire plan to the Wife within ten (10) days..." and argues that this language created an immediate debt owed to the Debtor.

The Stipulations establish that there were not any withdrawals made from the Plan prior to the Petition Date. According to the Stipulations, as amended, the withdrawals all took place after the Petition Date. Thus, the Trustee's statement that Mr. Flynn had "previously converted" certain funds belonging to the Debtor, is not supported.

With respect to the Trustee's arguments regarding the debt owed for the balance of the funds located within the Plan on the Petition Date, the Defendants argue that Ms. Flynn's interest in the Plan on the Petition Date, having been conferred by virtue of a Qualified Domestic Relations Order, is not property of the bankruptcy estate under Bankruptcy Code § 541(c)(2) and thus, no debt is owed to the estate by the Defendants. The uncontroverted affidavits of Mr. Flynn and Ms. Flynn, in addition to the arguments raised by their respective counsel, raise a question of material fact as to whether in addition to the Divorce Decree, there exists a "Qualified Domestic Relations Order" pursuant to which Ms. Flynn was granted an interest in the Plan. Copies of a document captioned "Qualified Domestic Relations Order" are attached to the Affidavits of Mr. Flynn and Ms. Flynn. The Trustee does not respond to or even address the legal effect of this document.

Evaluating the Trustee's Cross-Motion on its own merits, and in light of the Trustee's failure to respond to or address the facts set forth in the Affidavits of Mr. Flynn and Ms. Flynn, the Court finds that there remain genuine issues of material fact which make the grant of summary judgment on the Trustee's Cross-Motion inappropriate.

The Defendants' Motions

In contrast to the Trustee's Cross-Motion, the Defendants' Motions are supported by

uncontroverted affidavits that establish the existence of a QDRO pursuant to which Ms. Flynn was to receive her interest in the Plan. The Defendants argue that Ms. Flynn's undistributed interest in the Plan is not property of the estate pursuant to Bankruptcy Code § 541(c)(2) because it was an interest subject to restrictions on transfer that were enforceable under applicable non-bankruptcy law. The Trustee disagrees, ignoring the QDRO and arguing that based on the Divorce Decree the Debtor had an unlimited right of access to the funds, thus no anti-alienation clause was applicable to the Debtor.

The Trustee argues that where there is no anti-alienation clause in force, or where a QDRO permits unlimited access to the funds, the asset is property of the estate. *See In re Haggemann*, 260 B.R. 852 (Bankr. S.D. Ohio 2000); *In re Wiggins*, 60 B.R. 89 (Bankr. N.D. Ohio 1986); *In re Tavakoli,* Case No. 95-14978 (Bankr. N.D. Ohio June 28, 1996) (unpublished) (finding that the debtor lost the protection provided by the plan's anti-alienation provision upon obtaining access to the proceeds). The Court does not agree with the Trustee's reading of the provisions of the Divorce Decree. The Divorce Decree provides that the husband shall "transfer the entire plan ..." It does not provide that the husband shall transfer the proceeds of the Plan or, in any way, purport to alter the provisions or protections of the Plan. The Court finds that the Divorce Decree did not permit the Debtor unlimited access to the funds, rather it granted to her Mr. Flynn's interest in the Plan.

The Defendants rely on the decision of the United States Court of Appeals for the Eighth Circuit in *In re Nelson*, 322 F.3d 541 (8th Cir. 2003). The Eighth Circuit Court of Appeals held that a debtor's undistributed interest in an ERISA-qualified retirement plan was

excluded from the debtor's bankruptcy estate even though the interest derives from a qualified domestic relations order rather than directly from the plan. *In re Nelson*, 322 F.3d 541 (8th Cir. 2003). As the Defendants point out in their motions, the facts in *Nelson* are nearly identical to the facts of this case.[1] In this Case, as in *Nelson*, there is no dispute that the Plan is an ERISA-qualified retirement plan and contains an anti-alienation provision that is enforceable under applicable non-bankruptcy law.[2] The difference between this case and *Nelson* is that the Divorce Decree did not provide that the transfer to the Debtor would be made pursuant to a qualified domestic relations order. However, the uncontroverted facts established by Affidavit in this case show that, just as in *Nelson*, prior to the Petition Date, a QDRO was entered purporting to effect the transfer of the Plan to the Debtor. The Trustee does not discuss the impact of the QDRO on his argument, rather he ignores it completely.

The question is whether the transfer of the Plan to the Debtor pursuant to the QDRO allows the interest in the Plan to remain excluded from the property of the estate. This Court agrees with the reasoning of the Eighth Circuit Court of Appeals that:

> The relevant moment for determining whether property constitutes the bankruptcy estate is "as of the commencement of the case."11 U.S.C. §

1

In *Nelson*, the debtor and his wife obtained a divorce in September, 2000. *Id.* at 543. Pursuant to the terms of the divorce decree the debtor was awarded $71,089 from his ex-spouse's retirement plan. *Id.* Almost two months after the entry of the divorce decree the domestic relations court issued a "domestic relations order" to effect the distribution from the ex-spouse's retirement plan. *Id.* While the plan administrator was determining whether the domestic relations order was a "qualified" domestic relations order and before any funds had been distributed from the retirement plan, the debtor filed for bankruptcy. *Id.* One of the debtor's creditors argued that the debtor's interest in the retirement plan was property of the estate. *Id.*

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Although the Plan documents are not part of the record in this adversary proceeding, no party to this dispute has argued, or even suggested, that the Plan does not contain an anti-alienation provision that is enforceable under applicable non-bankruptcy law.

> 541(a)(1). [The debtor] commenced his bankruptcy on February 26, 2001. On that date, the lump-sum distribution owed him from [his ex-spouse's] retirement plan had not yet been distributed, and was therefore still held in trust by an ERISA plan. It logically follows that funds still held in trust are subject to ERISA's anti-alienation provision, and therefore excludable from a bankruptcy estate under § 541(c)(2).

Id. at 544. Therefore, the Court concludes that the Debtor's interest in the Plan is not property of the estate because it remained held in trust by an ERISA plan and had not been distributed as of the Petition Date.

For the reasons set forth above and based on the Stipulations and the facts set forth in the uncontroverted affidavits in support of the Defendants' motions for summary judgment, the Court finds that the Motions of the Defendants are well taken.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, that

1. The Motion of Valerie Flynn for Summary Judgment is hereby granted;

2. The Motion of William Flynn for Summary Judgment is hereby granted;

3. The Memorandum in Support of Judgment for Plaintiff (sic) is hereby denied; and

4. Judgment shall be entered in favor of the Defendants.

IT IS SO ORDERED.

MARILYN SHEA-STONUM
Bankruptcy Judge

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 30th day of September, 2004, the foregoing Order was sent via regular U.S. Mail to:

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