IT IS SO ORDERED.

Dated: 02:26 PM July 27 2005

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	CASE NO. 04-52150
	)	
MELANIE A. LARSON,	)	CHAPTER 7
DEBTOR	)	
	)	
HAROLD CORZIN , TRUSTEE	)	**ADVERSARY NO. 04-5163**
PLAINTIFF	)	
	)	JUDGE MARILYN SHEA-STONUM
vs.	)	
	)	
MELANIE A. LARSON,	)	
DEFENDANT	)	

ORDER (1) DENYING MOTIONS FOR SUMMARY JUDGMENT AND (2) SCHEDULING FURTHER STATUS CONFERENCE AND STIPULATIONS FILING DEADLINE

This matter comes before the Court on cross motions for summary judgment filed by plaintiff-trustee [docket #34] and defendant-debtor [docket #31] regarding plaintiff-trustee's complaint seeking turnover by defendant- debtor, pursuant to 11 U.S.C. § 542 and § 543, of certain funds held in an S.S.

Kemp & Co. 401(k) Plan (the "Plan"). Based upon a review of each party's motion and as discussed more fully herein, the Court finds that summary judgment is not appropriate at this time and neither motion will be granted.

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. 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, all facts and inferences must be viewed in the light most favorable to the nonmoving party. *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).

On April 22, 2004 defendant-debtor initiated a voluntary Chapter 7 bankruptcy petition. At the time that her bankruptcy was filed, defendant-debtor was the holder of an individual account in the Plan but her employment with S.S. Kemp & Co. had been terminated.[1]

The resolution of the within matter turns, in part, on whether the Plan contains "[a] restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law . . ." 11 U.S.C. § 541(c)(2). The U.S. Supreme Court has held that an anti-alienation provision in an "ERISA qualified" plan falls within the purview of § 541(c)(2) of the Bankruptcy Code. *Patterson v. Shumate*, 504 U.S. 753 (1992). *See also* Employee Retirement Income Security Act of

[1] The parties were not required to and did not file stipulations of undisputed facts. However, based upon each party's motion for summary judgment, neither has disputed the facts set forth in this paragraph.

1974 ("ERISA") § 1056(d)(1). Although each party makes passing reference to § 541(c)(2) and ERISA and also cites to *Patterson v. Shumate* in support of their respective arguments, neither discusses whether the Plan contains any language restricting transfer nor attaches copies of operative provisions of the Plan.[2] *See* Pl. Mem. in Opp. to Def. Mot. for S.J. at unnumbered pg. 2 [docket #34]; Def. Brief in Support of Mot. for S.J. at pp. 3-4 [docket #31].

In his motion for summary judgment, plaintiff-trustee contends that defendant-debtor is no longer a "participant" under the Plan and that, therefore, she has unrestricted access[3] to her funds in the Plan. Plaintiff-trustee further contends that such unrestricted access mandates a finding that such Plan funds are property of defendant-debtor's bankruptcy estate. In making this argument, plaintiff-trustee simply skips over any discussion of whether the Plan contains an anti-alienation provision constituting a restriction on transfer that is enforceable under § 541(c)(2).

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[2] Plaintiff-trustee attaches to his motion for summary judgment a sixteen page "Summary Plan Description" but does not make any reference in his motion to specific provisions of that document. The Court will not undertake an independent review of that document in the hopes of gleaning some information that may be pertinent to this matter.

[3] Whether or not defendant-debtor has "unrestricted access" to funds in the Plan appears to be at issue in this matter:

> It is the position of the Plaintiff that the separation from employment by the Defendant from S.S. Kemp and Company terminates the protection provided to her under the plan, based upon the *alleged* unrestricted access to the funds . . . .

Def. Brief in Support of Mot. for S.J. at pg. 4 [docket #31] (emphasis added).

Even if debtor's separation from employment results in her no longer being a "participant" under the Plan, an issue still exists as to what, if anything, the Plan provides as to restrictions on transfer of beneficial interests held by non-participants and whether, if it exists, such a restriction is enforceable under applicable nonbankruptcy law.

In her motion for summary judgment, defendant-debtor contends that, because the funds in the Plan could not be considered estate property if she had been employed when her case was filed and because she has not received any distribution from the Plan, plaintiff-trustee has no right to seek turnover of those funds. In making this argument, defendant-debtor also skips over any discussion of whether the Plan contains an anti-alienation provision constituting a restriction on transfer that is enforceable under § 541(c)(2).

If the Plan contains an anti-alienation provision constituting a restriction on transfer that is enforceable under § 541(c)(2),[4] the issue to be decided in this case would be a legal one: Whether the funds in the Plan retained their anti-alienation characteristics after debtor's employment with S.S. Kemp & Co. was terminated.[5] Courts that have considered this issue have come to differing conclusions.[6] *Compare In re Parks*, 255 B.R. 768 (Bankr. D. Utah 2000) (despite debtor's unrestricted ability to withdraw funds from an ERISA-qualified plan after termination of her employment, those funds were not property of the bankruptcy estate as long as they were still in the possession of the fund administrator) *with*

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4 *See In re Nolen*, 175 B.R. 214 (Bankr. N.D. Ohio 1994) setting forth a three prong test used to identify whether a plan is "ERISA-qualified" for purposes of § 541(c)(2) of the Bankruptcy Code.

5 Notwithstanding that counsel for each party represented to the Court that no issues of fact were in dispute, plaintiff-trustee appears to take issue with whether or not the Plan contains an anti-alienation clause:

> Moreover, even if this Court *should make the assumption* that there is an anti-alienation, anti-assignment clause which restricts transfer of this asset voluntarily or involuntarily to a creditor, it would still be property of the estate.

Pl. Mem. in Opp. to Def. Mot. for S.J. at unnumbered pg. 2 [docket #34]. When a matter has been presented for decision by summary judgment, the Court should not have to make assumptions about the status of the operative facts of the case.

6 There do not appear to be any U.S. Supreme Court or Sixth Circuit Court of Appeals decisions on this issue.

In re Wiggins, 60 B.R. 89 (Bankr. N.D. Ohio 1986) (funds in an ERISA-qualified plan would be property of the estate if debtor's employment had terminated prior to the filing of case because, upon such termination, debtor would be entitled to receive a distribution from the plan).

Although plaintiff-trustee and defendant-debtor may agree on the operative facts in this case, their motions for summary judgment do not make this clear and thus, cannot be granted. Accordingly, each of those motions is hereby *denied* and the Court will hold a further pre-trial conference in this matter on **August 24, 2005 at 3:00 p.m.** By not later than **August 22, 2005**, counsel shall have *jointly* filed with the Court a list of all matters which are not in dispute in this case and which can be the subject of stipulations including any documentary evidence upon which the parties intend to rely in prosecution of their respective cases.

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cc (*via* electronic mail): Michael Moran, counsel for plaintiff-trustee
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