

IT IS SO ORDERED.

Dated: 12:29 PM February 04 2009



**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

IN RE:)	
)	CASE NO. 07-52887
GEORGE H. CLARK,)	
)	CHAPTER 7
DEBTOR)	
)	
)	
HAROLD A. CORZIN, TRUSTEE)	ADVERSARY NO. 08-5096
)	
PLAINTIFF,)	JUDGE MARILYN SHEA-STONUM
)	
vs.)	
)	
GEORGE CLARK, ET AL.,)	MEMORANDUM OPINION
)	GRANTING TRUSTEE'S MOTION
DEFENDANTS)	FOR SUMMARY JUDGMENT
)	

I. PROCEDURAL BACKGROUND

Plaintiff-Trustee, Harold A. Corzin (“Trustee”), through counsel, initiated this adversary proceeding against Defendant-Debtor, George H. Clark (“Defendant”), Defendant-Pacific Life Insurance Company (“Pacific Life”), and Defendant-Continental Insurance Company (“CIC”), seeking an order (1) declaring and determining the rights of all parties to certain property in the form of an annuity contract, and (2) that this annuity contract be turned over to the Trustee.

This matter is before the Court on the following documents: Motion for Summary Judgment filed by Trustee (“Motion”) [docket # 22], and Response of Defendant to Trustee’s Motion (“Response”)[docket #24].

This matter is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(I), over which this Court has jurisdiction under 28 U.S.C. §1334(b) and the Standing Order of Reference entered in this District on July 16, 1984.

II. STIPULATED FACTS

The following facts are not in dispute and are the subject of Joint Stipulations filed by the parties [docket #18]:

1. That on the 6th day of September, 2007, Defendant did file his petition seeking relief under chapter 7 of the Bankruptcy Code.
2. That on or about the 7th day of September, 2007, Harold A. Corzin was appointed as Trustee, has qualified, and is presently acting as chapter 7 Trustee of the bankruptcy estate of Defendant.
3. Pacific Life has issued an annuity known as Pacific Life Insurance Contract

#2649201985B2 (the “Annuity”).

4. Pacific Life’s records reflect that CIC is the owner of the Annuity.
5. That the rights under said annuity were originally granted to Linda Cole (Defendant’s mother) who as beneficiary had, among other rights, the right to receive payments estimated to be in the amount of \$16,666 on the 7th day of May, 2011 and a payment estimated to be in the amount of \$59,281.33 due on the 7th day of May, 2016.
6. That as a result of the death of Linda Cole,¹ Defendant acquired the right to receive such payments.
7. That CIC and Pacific Life have agreed that they will recognize as valid and binding a determination by this court as to the respective rights of the Defendant and Trustee with respect to the contractual benefits to which Defendant is entitled pursuant to the Annuity. (See “Judgment Order”) [docket #21]²

III. DISCUSSION

A. Summary Judgment Standard

The court shall grant a movant’s motion for summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any,

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Although the date of Linda Cole’s death was not a stipulated fact, pursuant to the Court’s subsequent inquiry, counsel for Defendant informed the Court that Linda Cole died on August 31, 2006.

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Pursuant to the terms of the Judgment Order, neither Pacific Life nor CIC takes a position as to the competing rights and claims of the Defendant and Trustee under the Annuity. Also, Pacific Life and CIC agreed that they need not participate further in the proceedings other than to be given notice of further rulings.

show that 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 seeking summary judgment bears the initial burden of production by demonstrating the absence of any genuine issue of material fact, but the ultimate burden of demonstrating that an issue of fact still remains for trial lies with the non-moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Once the moving party satisfies its burden, the non-moving party must come forward with specific facts showing there is a genuine issue for trial. Fed. R. Civ. P. 56(e); Fed. R. Bankr. P. 7056(e). Where questions of law alone are involved, summary judgment is appropriate. *International Ass’n of Machinists v. Texas Steel Co.*, 53. 8 F. 2d 1116, 1119- 121 (5th Cir. 1976). The material facts in this case are not disputed. The issues before the Court are solely questions of law.

B. Law and Argument

Trustee and Defendant are in agreement that Defendant’s right to receive payment from the Annuity is property of Defendant’s bankruptcy estate. (Motion at 1-2; Response at 2). Defendant also does not take issue with the Trustee that there is no per se exemption available under Ohio law as pertains to annuities.³ Rather, Defendant argues that he is entitled to receive exemptions pursuant to ORC §§ 2329.66(A)(4)(a) (cash on hand) and 2329.66(A)(18) (any other property), up to \$400 respectively, and asks that the Court preserve his entitlement accordingly.

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Annuities which constitute retirement benefits are potentially subject to exemption under Ohio Revised Code (“ORC”) § 2329.66(A)(10). However, Defendant agrees that the Annuity does not conform to the explicit requirements to enable an annuity to qualify because payments from the Annuity are not necessary for Defendant’s support or the support of a dependent. (Response at 3). Even if Defendant were to make a valid argument that the Annuity meets the requirements of ORC § 2329.66(A)(10), his claim fails for the reasons set forth in the remainder of this Memorandum Opinion.

Pursuant to 11 U.S.C. § 522(1), “the debtor shall file a list of property that the debtor claims as exempt....” If a debtor does not comply with § 522(1)’s requirement and file a written statement of the property that he or she is claiming to be exempt, there is no basis for a trustee to file an objection or to move for an extension of time in which to file an objection. *Foster v. Moore (In Re Moore)*, 175 B.R. 13, 15 (Bankr. S.D. Ohio, 1994), citing *Hyman v. Plotkin (In re Hyman)*, 967 F. 2d 1316, 1319-20 n.6 (9th Cir. 1992). Therefore, to be exempt from claims of creditors in bankruptcy, property must be claimed as exempt by listing it under debtor’s claimed exemptions. *In re Hall*, 169 B.R. 732, 734 (Bankr. N.D. Okl., 1994). Assets not scheduled and not claimed as exempt cannot be allowed as exempt by the bankruptcy court. *In re Pomar*, 234 B.R. 135, 136 (Bankr. M. D. Fla., 1993).

The Court takes judicial notice of Defendant’s schedules filed in his chapter 7 bankruptcy case. Defendant has not scheduled the Annuity as an asset, nor does Schedule C reflect a claim that the Annuity is exempt. On November 28, 2007, Trustee’s initial report was filed and includes Defendant’s interest in the Annuity as a result of an inheritance [docket #13]. However, Defendant did not thereafter amend his schedules to include the Annuity or to claim it as exempt. Nor has Defendant propounded relevant case law to support his right to receive an exemption pursuant to the sections of the Ohio Revised Code upon which he relies. Accordingly, Defendant has failed to meet the threshold requirements to properly establish any right to an exemption in the Annuity.

IV. CONCLUSION

For the reasons discussed in this Memorandum Opinion, as to the issue of Defendant’s entitlement to an exemption in the Annuity, Trustee’s Motion is **GRANTED**. Defendant’s rights to receive payments under the Annuity are property of the estate and are not exempt from

the claims of creditors. The Court will make a separate entry of judgment in this proceeding that is consistent with this Memorandum Opinion.

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