

IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
Eastern Division

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U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

In Re:

In Proceedings Under Chapter 7

GEORGE C. EDWARDS,

Case No.: 08-18675

Debtor.

JUDGE RANDOLPH BAXTER

MEMORANDUM OF OPINION AND ORDER

Before the Court is the Chapter 7 Trustee's Motion for Turnover (the "Motion"). The Debtor opposes the Motion. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and General Order No. 84 of this District. After considering the pleadings filed by both parties, and conducting a duly-noticed evidentiary hearing, the Court rules as follows:

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The relevant facts are undisputed. Debtor filed a petition under Chapter 7 on November 6, 2008. Prior to and after the petition date, Debtor was employed by Lincoln Electric. On December 12, 2008, Debtor received a profit-sharing bonus of \$13,685.40 (the "Bonus") from Lincoln Electric. The Trustee filed the subject motion for turnover after discovery of the bonus at Debtor's § 341 meeting on January 13, 2009. At the evidentiary hearing on the matter, the parties stipulated to entry of the Lincoln Electric Employee Handbook into evidence. With respect to the employee bonus, the handbook states:

Every year since 1934, eligible employees have received a profit sharing bonus in December. The bonus is not guaranteed, and it does not happen automatically. The bonus is paid at the discretion of the Board of Directors of the Company and only if the Company is able to earn a profit. The size of the overall bonus is based

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on the profits of the Company, while your share is based on your individual pay and performance during the year. When the Company is successful in generating a profit, a portion is shared with employees as a reward for their part in earning the profit. [...]

Generally, to be eligible for bonus payment, you must be a Regular Employee and you must have been on the payroll prior to November 1 of the year in which a bonus is paid. Employees who leave the Company prior to August 1 will not be eligible to receive a bonus. [...] Bonus-eligible employees with one year of service or more who leave the Company between August 1 and the bonus payment date are eligible to receive a bonus only if approved by the Chairman and Chief Executive Officer. [...]

Bonus eligibility does not guarantee a bonus. It merely establishes an individual's ability to share in any bonus that may be declared in a particular year. Our Company Chairman and Chief Executive Officer is the final authority on bonus eligibility.

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The Trustee alleges that the Debtor had a contingent interest in the profit sharing bonus at the time he filed bankruptcy, thereby making the bonus property of the estate. In support, the Trustee relies on *In re Booth*, 260 B.R. 281 (BAP 6th Cir. 2001) where the court found that “[a] contingent interest is one in which there is no present fixed right of either present or future enjoyment; but in which a fixed right will arise in the future under certain specified contingencies ... ‘is fully alienable and may be attached by creditors.’” 260 B.R. 281 (BAP 6th Cir. 2001) (quoting *Cleve. Trust Co. v. McQuade*, 142 N.E.2d 249, 257 (1975)). The Trustee contends that, under Ohio law, the debtor had a contingent interest in the bonus when he filed for bankruptcy and that said contingent interest is property of the estate pursuant to 11 U.S.C. § 541.

Debtor contends that the bonus is not part of the Bankruptcy Estate because at the time of the petition Debtor held no property interest in the bonus at all. In support, Debtor relies on *In re*

Palmer, 57 B.R. 332 (W.D. Va. 1986), where the court held that a Lincoln Electric bonus paid post petition was not property of the estate because the bonus was “sufficiently rooted in post-petition events so as to constitute after-acquired property which would not pass to the Trustee as property of the estate.” Debtor further contends that the bonus could not be property of the estate because, under Ohio law, the bonus is not wages. *Bank One, Cleveland, N.A. v. Lincoln Elec. Co., Inc.* 55 Ohio Misc.2d 7, 563 N.E.2d 381 (Ohio Com.Pl. 1990). The Debtor then concludes that because the bonus is not wages, the Trustee cannot seek a pro-rated portion of the bonus.

The dispositive issue for the Court is whether the Debtor’s bonus paid post-petition is property of the bankruptcy estate pursuant to 11 U.S.C. § 541 and subject to turnover pursuant to 11 U.S.C. § 542.

The statutory provisions applicable to resolution of the Trustee’s Motion are as follows:

Section 542(a) of the Bankruptcy Code provides that:

(a) Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title [11 USCS § 363], or that the debtor may exempt under section 522 of this title [11 USCS § 522], shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

Section 541 of the Bankruptcy Code provides that:

(a) The commencement of a case under section 301, 302 or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

The burden of proof is upon the trustee seeking turnover of estate property, which burden must be met by a preponderance of the evidence. *In re Danowski*, 320 B.R. 886, 887 (Bankr. N.D. Ohio 2005) citing *Gorenz v. Illinois Dep't of Agriculture*, 653 F.2d 1179, 1184 (7th Cir. 1981)(the burden of proof in a turnover proceeding is at all times on the receiver or trustee; he must at least establish a prima facie case. After that, the burden of explaining or going forward shifts to the other party, but the ultimate burden or risk of persuasion is upon the receiver or trustee); see also *In re Patton*, 200 B.R. 172 (Bankr. N.D. Ohio 1996).

Property of the bankruptcy estate includes “all legal or equitable interests of the debtor in property as of the commencement of the case.” 11 U.S.C. §541(a)(1). The legislative history of §541 reveals that Congress intended a broad interpretation of what is to be included in the bankruptcy estate. See *Kovacs v. Thomson, Hewitt, & O'Brien*, 117 Ohio App.3d 465, 469 (9th Dist. 1997); *In re Dow*, 132 B.R. 853, 860 (Bankr.S.D.Ohio 1991). As the Supreme Court has stated, “[T]he term ‘property’ has been construed most generously and an interest is not outside its reach because it is novel or contingent or because enjoyment can be postponed.” *Segal v. Rochelle*, 382 U.S. 375, 379 (1966).

Although federal law determines whether a debtor's interest in property is property of the estate, it is state law that generally controls the question of whether a debtor has an interest in property. See *Butner v. United States*, 440 U.S. 48, 55 (1979). Under Ohio law, "[a] contingent interest is one in which there is no present fixed right of either present or future enjoyment; but in which a fixed right will arise in the future under certain specified contingencies." *Cleveland Trust Co. v. McQuade*, 106 Ohio App. 237, 142 N.E.2d 249, 257 (1957).

Herein, the Debtor's receipt of the bonus was conditioned, according to the Lincoln Electric Handbook on the following: 1) that the company decide to issue bonuses in a particular year; and 2) that the debtor be a regular employee on the payroll prior to November 1. It is undisputed that the Debtor, at the time of the filing of his petition, was a regular employee and on the payroll. Accordingly, one of the contingencies for receipt of the bonus was satisfied at petition filing.

The fact that the company had not yet declared bonuses for 2008 and, therefore, the Debtor did not have a right to possession or enjoyment of the bonus at the time he filed his petition, is not dispositive. Pursuant to Ohio law, "[a] contingent interest is one in which there is no present fixed right of either present or future enjoyment; but in which a fixed right will arise in the future under certain specified contingencies." *Cleveland Trust Co.*, 142 N.E.2d at 257 (1957). The Debtor's interpretation of what constitutes a "contingent" interest effectively excludes any contingent interest from being property of the estate. This interpretation is contrary to the Supreme Court's decision in *Segal v. Rochelle*, 382 U.S. 375, 379 (1966).

Furthermore, the Debtor's reliance on *In re Palmer*, 57 B.R. 332 (W.D. Va. 1986) is inconsistent with the Sixth Circuit BAP's decision in *In re Booth*, 260 B.R. 281 (BAP 6th Cir. 2001). In fact, the court in *Booth* criticized *Sharp v. Derry*, 253 B.R. 204 (E.D. Mich. 2000), a decision very similar on the facts to *Palmer*. In *Sharp*, the court excluded a postpetition bonus from property of the estate because the employee was required to be in good standing when the payment was made and the timing of the bonus payment was within the employer's discretion. That court concluded that the bonus could not be property of the estate because the debtor had no enforceable contract right at the time of his petition.

In criticizing *Sharp*, the BAP found that “[f]ocusing on whether the debtor had an ‘enforceable’ contract right when the petition was filed would exclude all contingent interests from the bankruptcy estate, because by definition, a contingent interest is not ‘enforceable’ until the contingency is met.” *Booth*, 260 B.R. at 290. The court further noted that “Section 541 neither states nor implies any requirement that the debtor must have an enforceable interest in property for that interest to become property of the bankruptcy estate.” *Id.*

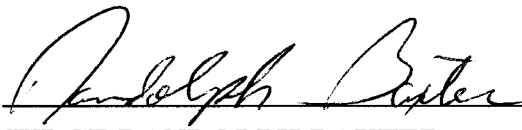
Nor does § 541 require that the bonus be classified as “wages” in order to be property of estate as the Debtor seems to argue in his reliance on *Bank One, Cleveland, N.A. v. Lincoln Elec. Co., Inc.* 55 Ohio Misc.2d 7, 563 N.E.2d 381 (Ohio Com.Pl. 1990). The fact that the court in *Bank One* found that a bonus was not wages and therefore not protected by laws related to garnishing wages is inapposite herein. The definition of property of the estate pursuant to § 541 is broad and includes “all legal or equitable interests of the debtor in property as of the commencement of the case.” There is no requirement that the bonus be classified as “wages” in

order to be considered property of the estate. Accordingly, because the Debtor, pursuant to Ohio law, had a contingent interest in the bonus at the time he filed his petition, the bonus is property of the estate and subject to turnover to the Trustee.

Accordingly, the Trustee's Motion for Turnover is hereby granted. The Debtor's opposition thereto is overruled. Each party is to bear its respective costs.

IT IS SO ORDERED

**Dated this 17th day of
August, 2009.**



JUDGE RANDOLPH BAXTER
UNITED STATES BANKRUPTCY COURT