

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

FILED
11 JUN 21 PM 1:29
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

IN RE:

**Gary and Sheryl Snyder,

Debtor.**

In Proceedings Under Chapter 7

Case No.: 09-18165

JUDGE RANDOLPH BAXTER

MEMORANDUM OF OPINION AND ORDER

The matter before this Court is the Trustee's Objection to the Debtors' Claim of Exemption ("Objection"). In his Objection, the Trustee asserts that the Debtors' claim of exemption was untimely filed and, if allowed, would unduly prejudice the Debtors' creditors. The Debtors filed a response to said Objection denying the Trustee's assertions. Core jurisdiction of this matter is acquired under provisions of 28 U.S.C. § 157(b)(2), 28 U.S.C. § 1334, and General Order No. 84 of this district. Upon the conclusion of a duly noticed evidentiary hearing and the consideration of the parties' respective briefs, arguments of counsel, testimony of witnesses and an examination of the record, generally, the following findings of fact and conclusions of law are hereby rendered:

*

The Debtors, Gary and Sheryl Snyder, filed for relief under Chapter 7 of the Bankruptcy Code on August 30, 2009. On their Schedule C, the Debtors listed a 28 (twenty-eight) foot Fifth Wheel Camper ("Camper") as unencumbered personal property with the value of zero. (Exh. 2). The Debtors also claimed \$0 as the exempt value in the Camper. *Id.* At the scheduled §341 meeting, the Trustee notified the Debtors of his intention to obtain an appraised value of the

Camper and of his subsequent intention to sell it. Subsequently, the Debtors obtained an online unofficial appraised value of the Camper in the range of \$800-900. (Exh. 5-2).

Upon Court approval, the Trustee employed an auctioneer and the Camper was sold at public auction for \$3,000 in August 2010. Notwithstanding, the Debtors did not amend their Schedule C (Exemption Schedule) until February 2011, one month after the Trustee's final report was filed. The first amended Schedule C incorrectly stated an exemption for both Debtors. (Exh. 3). The second amended Schedule C, filed in March, 2011 to correct the exemption for the Debtor-husband only, listed the value of the Camper at \$3,000 and a claimed exemption of \$969.80. (Exh. 4). This is an asset case, and the Camper was the only asset sold for distribution.

Although distribution has not yet occurred, the Trustee contends that the Debtors' delay in amending their schedules, without explanation, is sufficient to deny an exemption in its entirety. The Trustee's argument is two-fold. Firstly, he asserts that the second amended Schedule C was untimely because it was filed sixteen months after the Debtors first became aware of the Trustee's intent to sell the Camper. Secondly, he argues that the late-filed exemption, if allowed, would unduly prejudice creditors because it would diminish the available funds for distribution.

The Debtors object to the Trustee's contentions. According to the Debtors, e-mail exchanges between the Trustee and their attorney confirmed their assertion that the exemption would be paid. The Debtors later discovered they would not receive the exemption after the Trustee's final report failed to account for it. Consequently, the Debtors filed an objection to the Trustee's final report and a second amended Schedule C on March 7, 2011 and March 28, 2011,

respectively .

**

The dispositive issue for this Court's consideration is whether the Trustee has presented sufficient evidence to support a denial of the Debtors' amended claim of exemption.

An exemption claimed is deemed allowed unless a party in interest timely objects. *Rule 4003(b) Fed.R.Bankr.P.* The purposes of the exemptions are: "(1) to give the debtors a so-called "grub-stake" to begin their fresh start and (2) to act as a safety net, so that the debtor and his family are not completely impoverished due to creditor collection action or bankruptcy such that they become wards of the state." 3 Collier on Bankruptcy ¶ 522.02 (15th ed. 1995). Bankruptcy Procedural Rule 1009(a) provides the time frame in which a claim of exemption may be amended:

A voluntary petition, list, schedule, or statement may be amended by the debtor as a matter of course at any time before the case is closed. The debtor shall give notice of the amendment to the trustee and to any entity affected thereby. On motion of a party in interest, after notice and a hearing, the court may order any voluntary petition, list, schedule, or statement to be amended and the clerk shall give notice of the amendment to entities designated by the court.

Rule 1009 Fed.R.Bankr.P. The Sixth Circuit has adopted the "permissive approach" to setting time lines for when an exemption may be amended. This approach, which is supported by Rule 1009(a), allows exemptions to be amended any time before a case is closed. *Lucius v. McLemore*, 741 F.2d 125 (6th Cir. Tenn. 1984). Other Circuits also have adopted this approach. *See, Shirkey v. Leake*, 715 F.2d 859, 863 (4th Cir.1983); *In re Doan*, 672 F.2d 831, 833 (11th Cir.1982); *In re Gershenbaum*, 598 F.2d 779 (3d Cir.1979); *In re Andermahr*, 30 B.R. 532

(Bankr. 9th Cir.1983).

There are, however, two exceptions to this general rule. Courts may reject a later filed amended exemption where the debtor has 1) acted in bad faith or 2) concealed property. *Lucius*, 741 F.2d at 863; *Doan*, 672 F.2d at 833. The burden of proof lies with the party objecting to the claim of exemption. The objecting party must show bad faith by the preponderance of the evidence standard. See Fed. R. Bankr.P. 4003(c); *In re Kimble*, 344 B.R. 546, 551 (Bankr.S.D.Ohio 2006); *In re Sumerell*, 194 B.R. 818 (Bankr. E.D. Tenn. 1996); *In re Shurley*, 163 B.R. 286, 291 (Bankr.W.D.Tex.1993).

A party seeking denial of a claimed exemption must show more than a mere allegation of bad faith. Under the bad faith prong, an examination of the totality of the circumstances is necessary. *In re Opra*, 365 B.R. 728 (Bankr. E.D. Mich. 2007); citing, *In re Colvin*, 288 B.R. 477, 481–82 (Bankr.E.D.Mich.2003) (citations omitted). Bad faith may be shown if a debtor concealed assets or if “a debtor intentionally and deliberately delayed amending an exemption for the purpose of gaining an economic or tactical advantage at the expense of creditors and the estate.” *In re Arnold*, 252 B.R. 778, 785 (9th Cir. BAP. Cal. 2000). Prejudice to creditors may be established if the objecting party can show that “parties relying on the exemption claimed would have taken different actions or asserted different positions had the amendment occurred earlier.” See, *In re Daniels*, 270 B.R. 417, 426 (Bankr.E.D.Mich.2001) (quoting *In re Talmo*, 185 B.R. 637, 645 (Bankr.S.D.Fla.1995)). For example, “if a distribution of assets has already been made on the basis of exemptions previously claimed, then it is unfairly prejudicial to creditors, and too late to change exemptions.” *In re Knapp*, 283 B.R. 819 (Bankr.W.D. Pa. 2002); *In re Shaffer*, 92 B.R.632at 634 (Bankr.E.D.Pa.1988).

Herein, the Debtors seek to exempt \$969.80 of the \$3,000 in proceeds received from the sale of their Camper. This exemption was claimed on their second amended Schedule C but was not filed until after the Trustee's final report was submitted. The Debtors contend that the amended exemption was filed late because of the change in the Trustee's final report.

The Court is unpersuaded by the Debtors' arguments for several reasons. Firstly, the Debtors are not new to the bankruptcy process. During the hearing, the Debtor-husband testified that he and his wife have previously filed for bankruptcy relief three (3) times. (G.Snyder, Cross-Exam). Two of the three prior filings were Chapter 7 cases. *Id.* As such, the Debtors should be well acquainted with the bankruptcy process and the requisite documents that must be filed.

Secondly, the Debtors obtained an online appraisal from www.nada.com in November 2009, which valued the Camper between \$800-900 yet, they still failed to timely amend their exemption. (Exh. 5-2); (G.Snyder, Cross-Exam). Instead of amending their Schedule C at that time, the Debtors incorrectly relied on alleged statements of the Trustee to pay the exemption.

Thirdly, although the Court encourages communication between counsel, e-mail exchanges cannot circumvent a debtor's obligation to maintain an accurate petition and schedules, as both are signed under penalty and perjury of law. As such, the Trustee relies on the accuracy of this document for distribution purposes. Notwithstanding, the Debtors' reading of the exchanged e-mails is a clear misinterpretation of the Trustee's intent. After careful review of Exhibit 5, the Trustee's e-mail only indicates his willingness "to pay *any* exemption of the Debtors from the sale proceeds," it does not, however, state the Trustee's intention to pay the exemption, since no exemption, at that time, had been claimed. (See, Exh. 5-1, *emphasis added*; Exh. 2; Baumgart, Direct). Allowable exemptions must be claimed. *See*, 11 U.S.C. §522(b); *In*

re Hill, 95 B.R. 293, 297 (Bankr.N.D.N.Y. 1988); *Matter of Elliot*, 31 B.R. 33, 35 (Bankr.S.D. Ohio 1983). Otherwise, they are not automatically distributed by a trustee.

Lastly, the Court cannot overlook the affect the Debtors' late filed amendment had on the Trustee's fiduciary obligation to the estate. A trustee's duties are defined in §704 of the Bankruptcy Code and provides, in pertinent part, that the trustee shall "collect and reduce to money the property of the estate for which such trustee serves, and closes such estate as expeditiously as is compatible with the best interest of parties in interest[.]" 11 USC §704(a). By amending their exemption in the Camper after the Trustee's final report was filed, the Debtors restricted the Trustee's ability to effectuate his duties and to expeditiously close their case. Furthermore, fulfilling his duty by objecting to the late filed exemption, the Trustee incurred additional fees which, potentially, further diminished estate assets.

The remaining assets of the Debtors' estate are the proceeds from the sale of the Camper. The Debtors have only one (1) priority unsecured creditor, the Ohio Department of Taxation. After legal costs and fees, there is \$1,000 remaining to pay the priority unsecured debt, which accounts for approximately 50% of these proceeds. Notwithstanding the Debtors' exemption, this priority debt must be paid as it is non-dischargeable. As such, the Court is inclined to believe that distribution would be beneficial to the Debtors as well as their creditors. The Trustee has met his burden in showing that the Debtors' unjustified delay in amending their exemption has prejudiced their creditors. Allowing said exemption at this late juncture would only further the prejudicial effect.

Accordingly, the Trustee's Objection is hereby sustained. The Debtors' second amended claim of exemption in the Camper is hereby disallowed in its entirety. Each party shall bear its respective costs.

IT IS SO ORDERED.

Dated, this 21ST day of
June, 2011


JUDGE RANDOLPH BAXTER
UNITED STATES BANKRUPTCY COURT