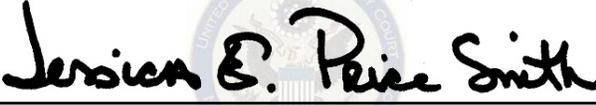


IT IS SO ORDERED.

Dated: 13 September, 2016 10:53 AM

  
JESSICA E. PRICE SMITH  
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

IN RE: IN PROCEEDINGS UNDER CHAPTER 7  
MORRIS H. ERVIN, SR.  
PATRICIA A. ERVIN, CASE NO. 15-14575  
DEBTORS. JUDGE JESSICA E. PRICE SMITH

**MEMORANDUM OF OPINION AND ORDER**

The matters before the court are the Trustee's Objection to Debtors' Exemption (Doc. No. 16) and the Trustee's Objection to Debtors' Amended Claim of Exemption (Doc. No. 31). The Debtors claimed an exemption in the amount of \$129,622.82 from a workers' compensation settlement. The Trustee argues that all of the funds, minus a wildcard exemption in the amount of \$1,139.00, are property of the Debtors' bankruptcy estate.

The Debtors responded to the Trustee's Objections, stating that they were entitled to exempt the entire amount of the settlement because the check representing the settlement had not been negotiated as of the petition date (Doc. No. 36). The Trustee replied (Doc. No. 39) and the Debtors supplemented their response (Doc. No. 43). The Trustee responded to the supplement (Doc. No. 44). This court has jurisdiction to decide this matter pursuant to 28 U.S.C. § 1334 and General Order No. 2012-7 entered in this district by the United States

District Court for the Northern District of Ohio. For the reasons stated below, the court finds the workers' compensation settlement is not exempt, and those funds, minus a wildcard exemption in the amount of \$1,139.00, are property of the Debtors' bankruptcy estate.

The Debtors filed their Chapter 7 petition on August 12, 2015. Mr. Ervin suffered a traumatic brain injury in 1994 that left him permanently disabled. The Debtors had been in settlement negotiations regarding his workers' compensation claim since the injury occurred. Negotiations concluded prepetition and Debtors received a check for \$129,622.82 prior to the filing date. The check had not been negotiated as of the petition date.

The Debtors claimed several exemptions in the settlement funds, including an exemption under O.R.C. § 2329.66(A)(9)(b) for the workers' compensation settlement from a work place injury that resulted in a permanent disability. In her Objection, the Trustee argues the Debtors are not entitled to this exemption because the statute exempts only "unpaid" settlements and delivery of a check, regardless of whether or not it has been negotiated, constitutes payment. (Doc. No. 16). The Debtors respond by asserting that a check is not considered payment if it is held by a debtor and not yet negotiated. (Doc. No. 36).

The Debtors amended their Schedule C to include an exemption pursuant to 11 U.S.C. § 522(d)(10)(C). The Trustee argues that Debtors cannot claim an exemption under the federal statute. (Doc. No 31). Alternatively, the Debtors argue that the settlement funds are exempt under O.R.C. § 2329.66(A)(10)(b) because the settlement is necessary for their support and maintenance. (Doc. No. 36).

With respect to the exemption claimed pursuant to O.R.C. § 2329.66(A)(9)(b), the issue before the court is whether a workers' compensation settlement is considered paid when a check has been received by a debtor, but not negotiated, at the time of filing of a bankruptcy petition.

O.R.C. § 2329.66(a)(9)(b) states: “Every person who is domiciled in this state may hold property exempt from execution, garnishment, attachment, or sale to satisfy a judgment or order, as follows: . . . The person's interest in the following: . . . Workers' compensation, as exempted by section 4123.67 of the Revised Code.” O.R.C. § 2329.66(A)(9)(b). Section 4123.67 of the Ohio Revised Code reads: “Except as otherwise provided in sections 3119.80, 3119.81, 3121.02, 3121.03, and 3123.06 of the Revised Code, compensation *before payment* shall be exempt from all claims of creditors and from any attachment or execution, and shall be paid only to the employees or their dependents.” O.R.C. § 4123.67. (emphasis added). A plain reading of the statute provides that an exemption under § 2329.66(A)(9)(b) can only be claimed before a workers’ compensation award is paid.

In support of their argument that the settlement was not paid at the time of filing, the Debtors assert that an instrument is not paid until it has been negotiated. (Doc. No. 36). They argue that, because they had not deposited the check from the settlement when they filed for bankruptcy, the settlement had not been paid. (*Id.*). In response, the Trustee asserts that relevant case law provides payment occurs upon delivery of the check. (Doc. No. 39). The Trustee is correct.

In *Ohio Bell Telephone Company v. Antonelli* the Supreme Court of Ohio analyzed the exempt status of workers’ compensation settlements under § 4123.67. 504 N.E.2d 717 (Ohio 1987). The court rejected the argument that all proceeds from workers’ compensation settlements are exempt, holding that proceeds are not exempt once payment is made to the claimant. *Id.* at 718. The court stated: “[a]ny construction or interpretation of R.C. 2329.66 that *would* serve to wholly exempt workers' compensation benefits from attachment would obviate the plain language of R.C. 4123.67.” *Id.* (emphasis in original).

In *In re Anspach*, the debtors' settlement was delivered by check to their worker's compensation counsel. 475 B.R. 612 (Bankr.S.D.Ohio 2010). On the advice of bankruptcy counsel, the check had not been negotiated at the time their bankruptcy petition was filed. *Id.* at 614. The debtors claimed an exemption in the funds under § 2329.66(A)(9)(b) and the trustee objected. *Id.* at 615. The court first found that exemptions are determined as of the date of filing. *Id.* (citing *In re Guikema*, 329 B.R. 607, 619 n. 8 (Bankr.S.D.Ohio 2005); *In re Lude*, 291 B.R. 109, 110 (Bankr.S.D.Ohio 2003)). Next, the court addressed whether a workers' compensation claim is considered paid upon delivery of the check to the claimant, or upon negotiation of that check, noting that the precise issue had not been decided by the Ohio Supreme Court. *Id.* at 616. The bankruptcy court interpreted the Ohio exemption statutes and case law as requiring a finding that payment occurs upon delivery of the workers' compensation award. *Id.* Because the award had been delivered by check prior to the filing date, it held that the workers' compensation proceeds were not exempt. *Id.* (However, the debtor in *Anspach* was allowed to retain the funds in question because the trustee's filing of the objection was untimely).

The facts in *Anspach* are similar to this case. Like the debtors in *Anspach*, the Ervins received the workers' compensation award in the form of a check prior to filing for bankruptcy, but did not deposit the check before the petition date. Based on *Antonelli* and *Anspach*, this Court finds that the workers' compensation award was paid prior to the time of filing because the check representing the award was delivered to the Ervins prior to the time of filing.

Accordingly, the award is not exempt under O.R.C. § 2329.66(A)(9)(b).

The Debtors are also not entitled to an exemption pursuant to 11 U.S.C. § 522(d)(10)(C). Ohio opted out of the federal exemptions pursuant to O.R.C. § 2329.662. An Ohio debtor who

wishes to claim an exemption must do so under Ohio law. *In re Schramm*, 431 B.R. 397, 400 (B.A.P. 6th Cir. 2010).

The Debtors alternatively argue that the workers' compensation award is exempt pursuant to O.R.C. § 2329.66(A)(10)(b) as necessary for support and maintenance. (Doc. No. 36). In support, Debtors note that Mr. Ervin is unable to work due to his traumatic brain injury and Mrs. Ervin's Social Security is the only household income. However, the workers' compensation settlement is not an annuity. The Debtors provide no legal authority to support treating the settlement as exempt under this provision.

The Trustee's Objections are sustained in their entirety (Doc. Nos. 16 and 31). The Court finds that the Debtors are entitled to a wildcard exemption in the amount of \$1,139.00 and the balance of the workers' compensation settlement proceeds are property of the Debtors' estate.

**IT IS SO ORDERED.**