

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

In re:)	Case No. 01-36776
)	
Diane Louise Harman)	Chapter 7
Adam Keith Harman)	
)	JUDGE MARY ANN WHIPPLE
Debtors)	

MEMORANDUM OF DECISION RE: BONUS CHECK

The issue here is whether a bonus that Debtor Adam Keith Harman ("Debtor" or "Mr. Harman") received from his employer after the commencement of his Chapter 7 case is property of the estate subject to turnover to the Chapter 7 Trustee. This issue is raised by the Trustee's Motion for Turnover of Bonus Check [Doc. #18], to which the Debtor has objected.¹ The court held a hearing on the motion for turnover, and requested affidavits for the record as permitted by Fed. R. Civ. P. 43(e), applicable to the motion for turnover by Fed. R. Bankr. P. 9017. For the reasons stated below, which constitute the court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a), applicable to the motion for turnover by Fed. R. Bankr. P. 9014 and 7052, the court finds that Mr. Harman's bonus is not property of the bankruptcy estate, and the Chapter 7 Trustee's motion for turnover of the bonus will be denied.

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The Trustee also filed a separate motion for turnover pertaining to both Debtors' income tax returns for the 2001 tax year and their interests in their income tax refund [Doc. # 10]. In response to both motions, Debtors filed a Motion to Apply Exemptions [Doc. #15]. Because Mr. Harman's right or need to claim an exemption could not be determined until the court decided whether the bonus was property of the estate, the motion for turnover of the tax refund and the related request to apply unused exemptions thereto have been held in abeyance until now. Additionally, Debtors had spent the bonus but not the tax refund. So in the event the court were to determine that the bonus was property of the estate, Mr. Harman's expressed legal (and strategic) preference would be to apply any unused exemption of his to the bonus and not to the tax refund.

FACTS:

Joint Debtors Diana Louise Harman and Adam Keith Harman commenced their Chapter 7 case on November 1, 2001. When the case commenced, Mr. Harman was an employee of Vorst Paving, in Cloverdale, Ohio, where he had been employed for 3 years. [Debtor's Schedule I , Doc. #1, and Affidavit of Adam Keith Harman, Doc. #26, ¶¶ 2,3 ("Harman Aff. at ____"). Mr. Harman did not disclose any pending employment bonus or claim any exemption rights related to any employment bonus in his bankruptcy schedules. Nevertheless, on December 7, 2001, Mr. Harman received a bonus from Vorst Paving. [Harman Aff. at ¶ 9; Affidavit of Dan Vorst, Doc. # 26, ¶ 7 ("Vorst Aff. at ____"). The Chapter 7 Trustee evidently learned of the bonus payment at the first meeting of creditors.²

The record shows that the bonus did not result from a written bonus or other employee benefit plan or contract existing through Mr. Harman's employment at Vorst Paving prior to the commencement of his case. Mr. Harman is an employee at will, with no contract of employment or union membership. [Harman Aff. at ¶¶4, 7-8; Vorst Aff. at ¶¶3, 5-6]. There is no dispute that the payment of an employee bonus at Vorst Paving is the decision and at the sole discretion of Mr. Vorst as the owner and president of the company. [Vorst Aft at ¶¶ 1,8-11]. The decision is not one dependent upon any particular timing or employee merit or seniority, but on company revenue. Employees have no way of knowing whether a bonus will be paid in any given year, as some years bonuses have been paid and some years they have not been paid. [Harman Aff. at ¶¶ 10-11; Vorst Aff. at ¶¶ 9-10, 12]. According to Mr. Vorst's uncontradicted affidavit, he made the decision on December 7, 2001, to pay a bonus to Mr. Harman and all other Vorst Paving employees.

LAW:

The court has jurisdiction over Debtor Adam Harman's Chapter 7 bankruptcy case under 28 U.S.C. § § 1334 and 157(a) and General Order 84-1, the general order of reference in this district. The court has authority to determine the Trustee's motion for turnover because it is a core proceeding. 28

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The amount of the bonus received is not in the record. The Harman and Vorst Affidavits are notable for scrupulously avoiding any mention of the amount, perhaps on the incorrect assumption that the amount, if known by the court, would otherwise influence the court's interpretation of the law and the application of the law to the facts in this case.

U.S.C. §§ 157(b)(1)and(b)(2)(E).

When debtors file for bankruptcy, an estate is created as a matter of law by 11 U.S.C. § 541(a), which defines property of the estate as "all legal or equitable interests of the debtor in property as of the commencement of the case." The words of the statute are very broad, and according to the legislative history, the purpose of Section 541(a) is to "bring anything of value that the debtors have into the estate." H.R. Rep. No. 95-595, at 176 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6136. While the determination whether a debtor's interest in property is property of the bankruptcy estate is a question of federal law, state law controls the question whether the debtor has an interest in property. *Booth v. Vaughan (In re Booth)*, 260 B.R. 281, 285 (B.A.P.6th Cir. 2001), citing *Butner v. United States*, 440 U.S. 48,55,99 S.Ct. 914,918,59 L.Ed. 2d 136 (1979).

As the words of Section 541 illustrate, there is a temporal distinction between property interests acquired by the debtor before the commencement of the case and property acquired by the debtor after the commencement of the case. Except as otherwise specifically set forth in Section 541(a)(5), the latter is not property of the estate and therefore not subject to turnover for payment of creditor claims. In this case, the question is therefore whether Mr. Harman had any pre-petition interest in or right to payment of a bonus from Vorst Paving that became property of his bankruptcy estate on November 1, 2001, when the case commenced.

There is no controlling precedent on this issue in this district or this circuit. The cases addressing this issue come to different results and rely on different reasoning. *Cf Lewis v. Chappo (In re Chappo)*, 257 B.R. 852 (E.D. Mich. 2001)(bonus paid post-petition by Ford Motor Company under the bonus plan for salaried employees is not property of the estate) *with In re Edmonds*, 263 B.R. 828 (E.D. Mich 2001) (bonus paid post-petition by Ford Motor Company is property of the estate). Notwithstanding the varying results in the case law, it is clear that the inquiry must focus on whether the payment is sufficiently rooted in the pre-bankruptcy period to constitute an interest of the debtor in property at filing. *See Segal v. Rochelle*, 382 U.S. 375, 380, 86 S.Ct. 511, 515, 15 L. Ed. 2d 428 (1966); *Edmonds*, 263 B.R. at 829. Moreover, the fact that the payment or interest is contingent on the occurrence of future events does not necessarily mean the debtor does not have any interest in the payment at filing that becomes property of the estate. *Booth*, 260 B.R. at 285-287. And as a general proposition, the less discretion the employer has with respect to payment of the post-petition bonus, the

more likely it is to be construed as property of the estate. Pre-petition contractual rights, where the only issue is timing or amount, tend to result in findings by courts that the debtor had an enforceable pre-petition right, as matter of state law, to collect a bonus that then became property of the estate. *Id.* (bonus, paid post-petition to Daimler-Chrysler hourly employee under written profit sharing program pursuant to pre-petition collective bargaining agreement, was property of the estate, pro-rated to the extent of pre-petition services).

With these general principles in mind in analyzing this case, the only thread that ties Mr. Harman's bonus to the pre-petition period is the fact of his continued employment. This is simply not "sufficiently rooted in the pre-petition past" to make the bonus property of Mr. Harman's estate as of November 1, 2001. There was no pre-petition written bonus plan or contractual right in any employee to any bonus from Vorst Paving, at any time. The record is clear that the bonus was completely discretionary in Mr. Vorst as president and owner of the company. And in some years bonuses were paid, while in other years bonuses were not paid. Regardless, there was no basis for any expectation in Mr. Harman as of November 1, 2001, that he would receive a bonus. In particular, the court notes the un rebutted testimony of Mr. Vorst that he decided on December 7, 2001, that the bonus should be paid. This was more than a month after commencement of Mr. Harman's Chapter 7 case. Likewise, Vorst Paving's payment of a bonus was not contingent on seniority or performance, even though the record does not show us the basis for calculation of any amount awarded, whether to Mr. Harman or to any other employee of Vorst Paving. Nor can the court find that there was any contingent future right to payment, just by virtue of Mr. Harman's continued employment.

This case contrasts with most others where courts have decided that a bonus paid post-petition constitutes a contingent right that is property of the estate as of the commencement of the case. In those cases, there is typically, at a minimum, a pre-petition written contract or benefit plan and/or a well-established history of payment that gives the employee some reasonable, enforceable expectation of a bonus with continued post-petition employment. *See, e.g., Edmonds*, 263 B.R. 828 (written collective bargaining agreement); *Booth*, 260 B.R. at 281 (same); *Rau v. Ryerson (In re Ryerson)*, 739 F.2d 1423 (9th Cir. 1984)(employment termination payment made post-petition pursuant to pre-petition contract); *cf Sharp v. Dery*, 253 B.R. 204 (E.D. Mich. 2000)(post-petition bonus not property of the estate, even where there was a written pre-petition bonus plan). As of November 1, 2001, Mr. Harman

did not have any contingent claim or cause of action or right under Ohio law, to which the estate would have succeeded under Section 541(a), to compel Vorst Paving to pay any bonus to him on any date after commencement of the case.³ The fact that, once it did, Mr. Harman may have contributed, in some unmeasured way, with his pre-petition employment efforts to the revenues and profits from which the bonus was ultimately paid is too general and insufficient in the court's view to connect it back to the pre-petition period and make it even a contingent right to payment that justifies turnover of the payment to the Chapter 7 Trustee as property of the estate. The bonus and its right to receipt did not arise until after the commencement of Mr. Harman's case, and are therefore excluded from the definition of property of the estate under Section 541(a).

CONCLUSION:

The court has considered all of the arguments and evidence, whether specifically identified above or not. As a result of its analysis, the court concludes that the bonus payment to Debtor Adam Keith Harman was not property of his bankruptcy estate subject to turnover to the Chapter 7 Trustee. The Debtor's Motion to Apply Exemptions is therefore moot with respect to the bonus payment. A separate judgment will be entered effecting this decision.

Dated:

/s/ Mary Ann Whipple
Mary Ann Whipple

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Neither party has directed the court to any relevant Ohio law. The cases the court has located, some involving the enforcement of written bonus plans and some involving enforcement of alleged oral bonus plans, tend to hold that no enforceable contract rights arise under Ohio law until any and all conditions have been satisfied. Until they have, in the context of at will employment, as here, even written bonus plans tend to be construed only as offers by the employer providing the employee no specified right or interest under the plan until the offer is accepted by fulfillment of all conditions. *See, e.g., Vocke v. Third Nat'l Bank & Trust Co.*, 267 N.E.2d 606, 613-14, 41 Ohio Misc. 58, 69 (Ohio Ct. App. 1971); *Harding v. Montgomery Ward Co.*, 58 N.E.2d 75, 41 Ohio Law Abs. 243 (Ohio Ct. App. 1944). In this case, the record lacks any written or oral "offer" to Mr. Harman from Vorst Paving that existed as of November 1, 2001, and that would constitute a contract or other contingent right that could be accepted by Mr. Harman and thus become property of his bankruptcy estate on November 1, 2001.

