

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

IN RE:)	CHAPTER 7
)	
GLADYS PATRICIA)	CASE NO. 98-61113
METCALF,)	
)	JUDGE RUSS KENDIG
Debtor.)	
<u>JOSIAH L. MASON, Trustee,</u>)	ADV. NO. 02-6120
)	
Plaintiff,)	
)	
v.)	MEMORANDUM OF DECISION
)	
GLADYS PATRICIA)	
METCALF,)	
)	
Defendant.)	

This matter is before the court on the motion for summary judgment of plaintiff Josiah L. Mason, trustee, (hereafter "Plaintiff") against defendant Gladys P. Metcalf, pro se (hereafter "Defendant").

JURISDICTION

The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(a) and the general order of reference entered in this district on July 16, 1984. This is a core proceeding under 28 U.S.C. § 157(b)(2)(E). The following constitutes the court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

FACTS AND ARGUMENTS

Defendant filed a Chapter 7 bankruptcy proceeding on April 14, 1998. On August 12, 1998, Defendant received a discharge of her debts, and on September 25, 1998, Defendant's case was closed.

In the interim, Defendant's mother, Eleanor W. Wilson, died on August 4, 1998 devising real estate located at 180 Bennett Street, Mansfield, Ohio 44903¹ to Defendant through her last will and testament. *See* Plaintiff's Motion for Summary Judgment and Motion for Judgment on

¹According to Defendant's petition, she resided at this address on her date of filing.

the Pleadings, Exhibits A and B. The real estate was transferred to Defendant on August 24, 1999 via a certificate of transfer issued by the probate division of the Richland County Court of Common Pleas. *See* Plaintiff’s Motion for Summary Judgment and Motion for Judgment on the Pleadings, Exhibit C. This property had a value of \$55,380.00 as of the year 2002 according to the Richland County Auditor. *See* Plaintiff’s Motion for Summary Judgment and Motion for Judgment on the Pleadings, Exhibit D. No liens or encumbrances, other than back real estate taxes of \$2,526.10, exist on the property. *See* Plaintiff’s Motion for Summary Judgment and Motion for Judgment on the Pleadings, Exhibit E.

When Plaintiff became aware of Defendant’s inheritance, Plaintiff moved to reopen Defendant’s case on December 14, 1998. The motion was granted December 15, 1998. In the meantime, Defendant amended Schedule C to include an exemption for the real estate she had inherited. Plaintiff objected to Defendant’s amendment of Schedule C, arguing that Defendant was not entitled to a claim a homestead exemption for the property as she had no legal interest in the property at the time of filing her petition. Defendant represented that she would be withdrawing the amendment.² On March 14, 2002, Defendant’s case was converted from a Chapter 13 proceeding back to a Chapter 7 proceeding.

Plaintiff commenced the within adversary proceeding³ on August 12, 2002 to require Defendant to turn over the real estate that she had inherited, presumably alleging that the property is property of the estate pursuant to 11 U.S.C. § 541(a)(5)(A).⁴ Defendant opposes the turn over.

²The docket reflects that Defendant never withdrew her exemption. Instead, after she converted to a Chapter 13 bankruptcy, she filed additional amendments, including renewing her amendment of Schedule C to include the inherited real estate.

³This matter could have been commenced as a motion for turn over under 11 U.S.C. § 542(a):

[A]n entity . . . in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title . . . 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.

11 U.S.C. § 542(a). “The asset to be turned over must be property of the debtor’s bankruptcy estate pursuant to § 541(a).” *In re Greer*, 242 B.R. 389, 393 (Bankr. N.D. Ohio 1999).

⁴Plaintiff does not actually cite a statutory basis for his complaint.

ANALYSIS

I. Standard of review

The procedure for granting summary judgment is found in Federal Rule of Civil Procedure 56(c), made applicable to this proceeding through Federal Rule of Bankruptcy Procedure 7056, which provides in part:

[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Federal Rule of Civil Procedure 56(c).

The evidence must be viewed in the light most favorable to the nonmoving party. Adickes v. S.H.Kress & Co., 398 U.S. 144, 158-59 (1970). Summary judgment is not appropriate if a material dispute exists over the facts, “that is, if evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Summary judgment is appropriate, however, if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party’s case and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). *See also* Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986).

The Sixth Circuit Court of Appeals has recognized that Liberty Lobby, Celotex, and Matsushita effected “a decided change in summary judgment practice,” ushering in a “new era” in summary judgments. Street v. J.C. Bradford & Co., 886 F.2d 1472, 1476 (6th Cir. 1989). In responding to a proper motion for summary judgment, the nonmoving party “cannot rely on the hope that the trier of fact will disbelieve the movant’s denial of a disputed fact, but must ‘present affirmative evidence in order to defeat a properly supported motion for summary judgment.’” Street, 886 F.2d at 1479 (quoting Liberty Lobby, 477 U.S. at 257). The nonmoving party must introduce more than a scintilla of evidence to overcome the summary judgment motion. Street, 886 F.2d at 1479. It is also not sufficient for the nonmoving party merely to “show that there is some metaphysical doubt as to the material facts.” Matsushita, 475 U.S. at 586. Moreover, “[t]he trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of material fact.” Street, 886 F.2d at 1479. That is, the nonmoving party has an affirmative duty to direct the court’s attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact.

This line of cases emphasizes the point that when one party moves for summary judgment, the nonmoving party must take affirmative steps to rebut the application of summary

judgment. Courts have stated that:

Under *Liberty Lobby* and *Celotex*, a party may move for summary judgment asserting that the opposing party will not be able to produce sufficient evidence at trial to withstand a directed verdict, and if the opposing party is thereafter unable to demonstrate that he can do so, summary judgment is appropriate. “In other words, the movant could challenge the opposing party to ‘put up or shut up’ on a critical issue [and] . . . if the respondent did not ‘put up,’ summary judgment was proper.”

Fulson v. City of Columbus, 801 F. Supp. 1, 4 (S.D. Ohio 1992) (citations omitted) (quoting Street, 886 F.2d at 1478).

II. Property of the estate

Section 541(a)(1) of the Bankruptcy Code defines property of the estate as:

(a) The commencement of a case . . . creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) . . . all legal or equitable interests of the debtor in property as of the commencement of the case.

11 U.S.C. § 541(a)(1). This definition is all-inclusive. United States v. Whiting Pools, Inc., 462 U.S. 198, 203-04 (1983). However, property of the estate is generally limited to legal or equitable interests in property that were held by the debtor at the time of filing of her bankruptcy petition. American Bankers Ins. Co. v. Maness, 101 F.3d 358, 362 (4th Cir. 1996); Greer, 242 B.R. at 393. There are exceptions to this rule for after-acquired property. Section 541(a)(5)(A) provides:

(a) The commencement of a case . . . creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

...

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date –

(A) by bequest, devise, or inheritance.

11 U.S.C. § 541(a)(5)(A). Therefore, the debtor must acquire or become entitled to acquire property within 180 days after filing bankruptcy, and the property must have otherwise been property of the estate if the debtor had held an interest in the property on the date of filing her petition. This provision of the Bankruptcy Code is known as the “Claw-Back Provision.” Greer, 242 B.R. at 393, fn. 1. This provision brings property back into the estate that otherwise would have been excluded. Id. “Congress enacted the Claw-Back Provision in order to prevent debtors from manipulating the bankruptcy petition date so as to deprive creditors of certain assets.” Id. (citing United States of America v. Gold (In re Avis), 178 F.3d 718 (4th Cir. 1999) (dissenting opinion)).

Whether property is property of the estate is a question of federal law. However, unless there is a strong countervailing federal interest, the actual existence of a debtor’s right in property is determined by state law. Id. (citing Butner v. United States, 440 U.S. 48, 54-55 (1979); In re White, 851 F.2d 170, 173 (6th Cir. 1988)). Therefore, Plaintiff must demonstrate that the real estate Defendant inherited conferred upon her a property interest recognizable under state law. Plaintiff bears the burden of proof on this matter. Id. (citing Alofs Mfg. Co. v. Toyota Mfg., Kentucky, Inc. (In re Alofs Mfg. Co.), 209 B.R. 83, 91 (Bankr. W.D. Mich. 1997)).

Defendant’s deceased mother died testate devising real estate to her that was probated in accordance with state probate laws. Clearly, Defendant received an interest in real estate that is recognized under state law. Defendant’s claim to this interest arose within 180 days of the filing of her bankruptcy petition upon the death of her mother. This property would have been property of the estate had Defendant held an interest in it at the time of her bankruptcy filing. Plaintiff has met his burden of proof. Defendant’s interest in the real estate is property of her bankruptcy estate pursuant to § 541(a)(5)(A) and is subject to turnover pursuant to § 542(a). absent any applicable exemption.

III. Homestead exemption

Federal Rule of Bankruptcy Procedure 1007(h) mandates that a debtor who acquires or becomes entitled to acquire any interest in property as provided in 11 U.S.C. § 541(a)(5) file a supplemental schedule. Fed. R. Bank. Pro. 1007(h). Federal Rule of Bankruptcy Procedure 1007(h) also mandates that “[i]f any of the property required to be reported under this subdivision is claimed by the debtor as exempt, the debtor shall claim the exemptions in the supplemental schedule.” Fed. R. Bank. Pro. 1007(h). Defendant fulfilled the requirements of these Rules when she filed an amended Schedule C to which Plaintiff objected.

The right to claim property as exempt is granted under 11 U.S.C. § 522(b). The property that may be exempted by a debtor is controlled by § 522(d) unless the state in which the debtor’s domicile is located has opted out of § 522(d), in which case the property that may be claimed as exempt is controlled by state law. *See* 11 U.S.C. § 522. Ohio, in O.R.C. § 2329.662, has opted

out of § 522(d). O.R.C. § 2329.622. Therefore, the property that may be claimed as exempt by Defendant in the case at hand is determined by state law.

Defendant has claimed a homestead exemption of \$5000.00 under O.R.C. § 2329.66(A)(1)(b) in the inherited real estate. In order for the homestead exemption to be an allowable exemption, Defendant must have an interest in the real estate and use the real estate as a residence. Defendant resided in the real estate when she filed her bankruptcy petition, however, she did not have an interest in the real estate at that time. She acquired her interest post-petition. Plaintiff argues that Defendant must have had the interest at the time she filed her petition. The court disagrees. In rejecting the argument that property could not be exempted because the property was not owned on the petition date, a bankruptcy court has held: “Under § 522(b), a debtor may select exempt property from ‘property of the estate.’ Under § 541, ‘property of the estate’ includes property inherited within 180 days after the petition is filed. The Trustee’s objection must be denied.” In re Magness, 160 B.R. 294 (Bankr. N.D. Tex. 1993); accord In re Parrish, 2002 WL 31474172 (Bankr. M.D.N.C. 2002) (debtor allowed to exempt inherited property that came into the estate post-petition pursuant to § 541(a)(5)(A)); In re Notarqiacomo, 253 B.R. 112 (Bankr. S.D.Fla. 2000) (debtor allowed exemption in inherited property that came into the estate post-petition pursuant to § 541(a)(5)(A)).

Property cannot be exempted unless and until it becomes property of the estate. The real estate Defendant inherited became property of the estate pursuant to § 541(a)(5)(A) when her mother died. At that time, she claimed an exemption in the property pursuant to O.R.C. § 2329.66(A)(1)(b). Defendant had an interest in the real estate at that time and resided there. Defendant’s homestead exemption is allowable.

CONCLUSION

Plaintiff commenced an adversary proceeding for the turnover of real estate Defendant inherited from her mother post-petition. Defendant objected to the turnover and claimed a homestead exemption in the real estate.

For the foregoing reasons, the court finds that Plaintiff has met his burden, no genuine issue of material fact exists, and Plaintiff is entitled to judgment as a matter of law. Defendant shall vacate the premises and turn over the real estate located at 180 Bennett Street, Mansfield, Ohio 44903 to Plaintiff who shall sell the property and remit a homestead exemption of \$5000.00 to Defendant.

An order consistent with this memorandum of decision shall enter forthwith.

RUSS KENDIG
U.S. BANKRUPTCY JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this Memorandum of Decision and accompanying Order was faxed to Plaintiff and mailed, via overnight mail delivery, to Defendant on the ____ day of April 2003.

Josiah L. Mason
P.O. Box 345
Ashland, Ohio 44805
(419) 281-6530

Gladys Metcalf
180 Bennett Street
Mansfield, Ohio 44902

Deputy Clerk

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Debtor.)	
<u>JOSIAH L. MASON, Trustee</u>)	ADV. NO. 02-6120
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Plaintiff,)	
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v.)	ORDER
)	
GLADYS PATRICIA)	
METCALF,)	
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Defendant.)	

This matter came before the court on the motion for summary judgment filed by Plaintiff against Defendant and Defendant's amended exemption schedule and objection thereto by Plaintiff. For the reasons stated in the Memorandum of Decision, Plaintiff's motion for summary judgment is **GRANTED**, Plaintiff's objection to Defendant's amended exemption schedule is **OVERRULED**, and Defendant's homestead exemption of **\$5,000.00** is **ALLOWED**. All matters being resolved, the hearing set for April 7, 2003 at 9:00 a.m. is cancelled.

It is further **ORDERED** that Plaintiff is granted all rights of turnover, including the right to possession of the property and to pursue an eviction action in state court.

It is so ordered.

RUSS KENDIG
U.S. BANKRUPTCY JUDGE