

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:) Case No. 04-33169
)
Michael J. Ramos) Chapter 7
Mary A. Ramos,)
)
Debtors.) JUDGE MARY ANN WHIPPLE

MEMORANDUM OF DECISION AND ORDER
REGARDING TRUSTEE'S OBJECTION TO EXEMPTION

This case is before the court on the Trustee's Motion Objecting to Exemptions [Doc. # 18]. A hearing was held at which the court heard oral argument on the motion by both the Trustee and counsel for Debtor. The Trustee objects to exemptions totaling \$1,200 claimed under Ohio Revised Code §§ 2329.66(A)(4)(a) and (A)(18) in garnished wages recovered by the Trustee as preferential transfers. For the reasons that follow, the Trustee's motion will be denied in part and granted in part.

FACTUAL BACKGROUND

Debtors filed a joint petition under Chapter 7 of the Bankruptcy Code on April 20, 2004. In their Statement of Financial Affairs, they disclosed wage garnishments totaling \$1,372.87 that occurred during the ninety days immediately preceding the commencement of the case. Debtors did not schedule the garnished wages as an asset on Schedule B, nor did they claim the wages, or any part thereof, as exempt on Schedule C.

Instead, in addition to exemptions in other property that is not at issue in this case, they each claimed their \$400 individual exemption under Ohio Revised Code § 2329.66(A)(4)(a), for a total of \$800, to exempt in full the \$200 in their checking account and \$200 in their savings account, as well as \$305 in income tax refunds.¹ Debtors claimed \$95, the balance of the § 2329.66(A)(4)(a) exemption, in property listed as a deposit with Foreclosure Solutions, LLC valued at \$900. In addition, they each claimed their

¹ Debtor-spouses may each claim their individual exemptions under the Ohio exemption statute. *In re Szydlowski*, 186 B.R. 907, 910 (Bankr. N.D. Ohio 1995).

\$400 “wild card” exemption under Ohio Revised Code § 2329.66(A)(18), for a combined total of \$800, in the Foreclosure Solutions, LLC, deposit.

Based on the fact that Debtors had claimed all of the exemptions to which they are entitled under §§ 2329.66(A)(4)(a) and (A)(18) in their original Schedule C, the Trustee used her avoidance power under 11 U.S.C. § 547(b) to recover as preferential transfers the \$1,372.87 in wages garnished within ninety days of the commencement of the case. Thereafter, Debtors amended their Schedules B and C. The amendment to Schedule B identified the recovered garnished wages and the amendment to Schedule C claimed a \$400 exemption under § 2329.66(A)(4)(a) and an \$800 exemption under § 2329.66(A)(18) in the recovered wages.² Also on amended Schedule C, Debtors changed the previously claimed exemptions in the Foreclosure Solutions, LLC, deposit of \$900 to zero. Other exemptions claimed by Debtors remain unchanged.³

LAW AND ANALYSIS

The Trustee objects to the exemptions claimed under §§ 2329.66(A)(4)(a) and (A)(18) in the garnished wages recovered by her as preferential transfers. The Trustee argues that property avoided by a trustee under 11 U.S.C. § 547 may not be claimed as exempt property by a debtor. The Trustee also argues that Debtors received the exemption to which they are entitled under Ohio law with respect to their wages at the time of the garnishment and are not entitled to an additional exemption on recovery of those wages. For the following reasons, these arguments are not well taken.

² There is no indication in the record whose wages were garnished, Michael Ramos, Mary Ramos or both. And the Trustee has not objected to the claimed exemptions based on the fact that both Debtors have claimed their individual exemptions in the garnished wages. As the Trustee has the burden of proving that Debtors are not entitled to the claimed exemptions, Fed. R. Bankr. P. 4003(c), the court will assume for purposes of this motion that both Debtors’ wages were garnished in at least the amount of their individual exemption claimed.

³ Debtors’ “amended” Schedule B lists only the \$900 deposit with Foreclosure Solutions, LLC, a malpractice claim and the wage garnishments. It fails to list any of the other property scheduled on the original Schedule B filed with Debtors’ petition. Similarly, their “amended” Schedule C fails to set forth all of the previously claimed exemptions relating to the property originally included but omitted in their amendments. Instead, it lists only those exemptions Debtors wished to add or change. As such, the “amended” schedules are in fact supplemental schedules and will be so construed by the court. It should be noted, however, that a document may not be properly amended by interlineation. Instead, the entire amended document, rather than the modifications only, should be filed with the court.

Initially, the court notes that debtors generally may amend their bankruptcy schedules “as a matter of course at any time before the case is closed.” Fed. R. Bankr. P. 1009(a). Notwithstanding the liberal allowance of amendments under Rule 1009(a), “courts may still refuse to allow an amendment where the debtor has acted in bad faith or where property has been concealed.” *Lucius*

v. McLemore, 741 F.2d 125, 127 (6th Cir. 1984). In addition, “[e]ven in the absence of bad faith or concealment of property, an amendment might not be allowed if the objecting party could show a resulting prejudice to creditors.” *In re Asbury*, 263 B.R. 839, 840 (Bankr. S.D. Ohio 2001) (citing *Doan v. Hudgins (In re Doan)*, 672 F.2d 831, 833 (11th Cir. 1982).

There is no evidence or allegation that Debtors in this case acted in bad faith. Claiming an exemption late, without more, is not bad faith. *Arnold v. Gill (In re Arnold)*, 252 B.R. 778, 786 (B.A.P. 9th Cir. 2000). In addition, Debtors would have no reason, and did not attempt, to conceal the wage garnishments at issue. The wage garnishments were fully disclosed in Debtors’ Statement of Financial Affairs and were recognized by the Trustee as an asset of Debtors. *See id.* (concluding the record did not support a finding that the debtors intended to conceal an asset that was disclosed in their Statement of Financial Affairs and that the trustee recognized as an asset).

Regarding prejudice to creditors, the objecting party must show that a creditor would be prejudiced in some manner other than that normally associated with a claim of exemption. *Ardrey v. Blackwell (In re Ardrey)*, 316 B.R. 531, 534 (B.A.P. 8th Cir. 2004); *Arnold v. Gill (In re Arnold)*, 252 B.R. 778, 787 (B.A.P. 9th Cir. 2000) (stating prejudice is present where creditor suffers an actual economic loss due to a debtor’s delay in claiming his exemption). A creditor is not prejudiced merely because an exemption, if held timely, would be granted. *Arnold*, 252 B.R. at 787. There is nothing in the record in this case showing that any creditor is worse off now than if Debtors had asserted the now-claimed exemption at the outset of the case.

Nevertheless, the Trustee challenges the ability of a debtor to exempt property that was recovered by a trustee under 11 U.S.C. § 550 after the transfer of the property was avoided by the trustee under § 547. She argues that such recoveries are for the benefit of the estate, not of the debtor. While it is true that § 550(a) provides that “[e]xcept as otherwise provided in this section, to the extent that a transfer is avoided

under section . . . 547 . . . of this title, the trustee *may recover for the benefit of the estate*, the property transferred . . . ,” § 522(g) creates an exception allowing such recoveries to benefit the debtor. Section 522(g) provides in relevant part as follows:

Notwithstanding sections 550 and 551 of this title, the debtor may exempt under subsection (b) of this section property that the trustee recovers under section . . . 550 . . . of this title, to the extent that the debtor could have exempted such property under subsection (b) of this section if such property had not been transferred, if –

(1) (A) such transfer was not a voluntary transfer of such property by the

debtor; and

(B) the debtor did not conceal such property. . . .

11 U.S.C. § 522(g). Thus, the Bankruptcy Code expressly provides that a debtor may exempt property recovered by the Trustee after avoiding a preferential transfer under § 547 unless the transfer was voluntarily made by the debtor or the debtor concealed the property from the trustee and creditors.

The wage garnishments at issue in this case were obviously not voluntary transfers and, as discussed above, Debtors did not attempt to conceal these wages. Rather, each of the wage garnishments were disclosed in Debtors’ Statement of Financial Affairs. Debtor has therefore satisfied the requirements of § 522(g).

The Trustee also challenges the availability of exemptions in garnished wages in addition to the exemption provided by Ohio Revised Code § 2329.66(A)(13), which provides an exemption at the time the wages are garnished equal to an amount determined by a multiple of the federal minimum hourly wage or seventy-five percent of the disposable earnings owed to the debtor, whichever is greater. While § 2329.66(A)(13) may provide the only exemption available in garnished wages outside of bankruptcy, the Ohio statute expressly provides for additional exemptions that may be claimed in bankruptcy proceedings. Specifically, § 2329.66(A)(4)(a) provides a \$400 exemption to be applied “only in bankruptcy proceedings” and further provides that this exemption “may include the portion of personal earnings that is not exempt under division (A)(13) of this section.” In addition, the Ohio exemption statute provides a “wild card” exemption of \$400 “in *any* property” that is also applicable “only in bankruptcy proceedings.” Ohio Rev. Code § 2329.66(A)(18) (emphasis added). Thus, the exemptions under § 2329.66(A)(4)(a) and (A)(18) claimed by Debtors in the garnished wages recovered by the Trustee are clearly contemplated by the Ohio exemption statute.

Notwithstanding the court's rejection of the Trustee's arguments, Debtors are entitled only to the exemptions provided in § 2329.66. Exemptions are not expanded by use of the avoidance powers. 11 U.S.C. § 522(j). Considering Debtors' original Schedule C together with what the court construes as their "supplemental" Schedule C, *see supra* fn. 3, Debtors have claimed exemptions in excess of those permitted. Debtors are each entitled to a \$400 exemption under § 2329.66(A)(4)(a), for a total of \$800. But they claim exemptions under § 2329.66(A)(4)(a) of \$400 in their bank accounts and \$305 in their 2003 state and federal income tax refunds, leaving only a \$95 balance under that section. While that \$95 was previously claimed as an exemption in the deposit with

Foreclosure Solutions, LLC, and Debtors' supplemental Schedule C changed that exemption to zero, their supplemental schedule also claimed an additional \$400 exemption under § 2329.66(A)(4)(a) in the wage garnishments recovered by the Trustee rather than limiting that exemption to their \$95 balance. Thus, Debtors claimed exemptions exceed those permitted under Ohio's exemption statute by \$305. In addition to the \$800 "wild card" exemption under § 2329.66(A)(18), they are only entitled to a \$95 exemption in the wage garnishments, the balance available under § 2329.66(A)(4)(a). The court appreciates the Trustee's frustration in this case. She properly did her job based on the Debtors' original Schedule C. Had Debtors originally claimed the garnished wages as exempt, she would not have pursued them for the benefit of the estate and quite correctly would have left it up to Debtors and their lawyer to do the work of avoidance and recovery under 11 U.S.C. § 522(h). The court notes, however, that the Trustee is provided some statutory protection by 11 U.S.C. § 522(k). Section 522(k)(1) provides that property recovered by a trustee under § 522(g) and exempted by a debtor is liable for an aliquot share of the costs and expenses incurred in recovery. The record does not show whether the Trustee incurred any costs and expenses in recovering the garnished wages. But based on the court's decision that Debtors are entitled to receive and exempt part of the garnished wages recovered by the Trustee, she may recover an aliquot share of any such costs and expenses from the exempt amount under § 522(k)(1) before payment to Debtors.

THEREFORE, for the foregoing reasons, good cause appearing,

IT IS ORDERED that the Trustee's Motion Objecting to Exemptions [Doc. # 18] be, and hereby is, **DENIED** with respect to Debtors' exemption claimed under Ohio Revised Code § 2329.66(A)(18),

and **GRANTED in part** and **DENIED in part** with respect to Debtors' exemption in the wage garnishments under Ohio Revised Code § 2329.66(A)(4)(a). Debtors' exemption under Ohio Revised Code § 2329.66(A)(4)(a) in the wage garnishments is limited to the remaining balance of \$95.

Mary Ann Whipple
United States Bankruptcy Judge