

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:)	Case No.: 04-32383
)	
Edward E. Plaugher,)	Chapter 7
)	
Debtor.)	Adv. Pro. No. 04-3180
)	
Bruce Comly French, Trustee,)	Hon. Mary Ann Whipple
)	
)	
Plaintiff,)	
v.)	
)	
Edward E. Plaugher)	
and Tammy Plaugher)	
)	
Defendants.)	

MEMORANDUM OF DECISION AND ORDER
DENYING MOTION FOR SUMMARY JUDGMENT

Bruce Comly French (“Trustee”), the trustee for the bankruptcy estate of Edward E. Plaugher (“Debtor”) is before the court on the Plaintiff/Trustee’s Motion for Summary Judgment that he filed in this case adversary proceeding on January 14, 2005 (the “Motion”). Neither Defendant has responded to the Motion. Notwithstanding the lack of opposition to the Motion, after reviewing the Motion and the discovery submitted in support thereof, the court will deny the Motion.

The complaint initiating this proceeding seeks (1) an injunction prohibiting Debtor and his spouse or former spouse, Tammy Plaugher (“Ms. Plaugher”), from transferring any property of Debtor’s bankruptcy estate without court authorization, and (2) an accounting as to all property of the estate. The Motion seeks

summary judgment requiring the turnover of a 1991 Ford Explorer, and the sum of \$3,074.99 received by Ms. Plaughter from Debtor's profit-sharing plan.¹ Generally, a trustee

is entitled to the turnover of property of a bankruptcy estate that he or she may use, sell, or lease pursuant to § 363 of the Bankruptcy Code, unless the property is of consequential value or benefit to the estate. 11 U.S.C. § 542(a).

Debtor's Schedule B does reflect an interest in the Explorer having a value of \$1,000, and his Schedule C does not claim an exemption in that vehicle. Trustee asserts that the Explorer is titled in Debtor's name, citing Ms. Plaughter's affirmative response to Trustee's request for admission no. 3. However, that request asked Ms. Plaughter to admit that "[t]he car you are driving is titled in the name of Edward Plaughter and it has been so titled during the past year," and it is unclear that the car Ms. Plaughter is driving is the 1991 Ford Explorer. Accordingly, the court must deny the Motion insofar as the vehicle is concerned.

As for the funds received by Ms. Plaughter, she admits that she received the sum of \$3,074.99 from the Auglaize County Child Support Enforcement Agency. However, Trustee's request for admissions did not identify the source of the funds as Debtor's profit-sharing plan. Moreover, there are numerous other facts that must be established to determine whether the funds represent property of Debtor's bankruptcy estate.

For example, § 541(c)(2) of the Bankruptcy Code provides: "A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title." The Supreme Court has held that transfer restrictions that must be included in ERISA-qualified pension and profit-sharing plans, *see* 29 U.S.C. § 1056(d), are enforceable under "applicable nonbankruptcy law" and, therefore, enforceable in bankruptcy so that such a plan does not constitute property of the estate, *Patterson v. Shumate*, 504 U.S. 753, 112 S. Ct. 2242 (1992), at least where the plan assets are held in trust under applicable nonbankruptcy law, *Rhiel v. Adams (In re Adams)*, 302 B.R. 535 (B.A.P. 6th Cir. 2003); *Booth v. Vaughan (In re Booth)*, 260 B.R. 281, 290-91 (B.A.P. 6th Cir. 2001). Trustee has presented no evidence as to whether Debtor's profit-sharing plan

¹ As the Motion does not indicate that Trustee is seeking partial summary judgment, it thus appears that he has abandoned his request for injunctive relief.

constitutes an ERISA-qualified plan or whether the plan assets are held in trust. Moreover, even if Debtor's interest in the plan would otherwise constitute property of the estate, the case upon which Trustee relies indicates that the interest would not be property of the estate to the extent it is attributable to Debtor's postpetition employment. *Booth*, 260 B.R. at 290; *see* 11 U.S.C. § 541(a)(6) (earnings from debtor's postpetition personal services are not property of estate). Again, Trustee has presented no evidence in this regard.

Nor has Trustee presented any evidence as to when the funds were seized. If Ms. Plaughter received the funds after the commencement of Debtor's Chapter 7 case, the funds in the hands of the plan trustee or administrator, a state court, or perhaps the child support enforcement agency would become property of the estate. *State ex rel. Auto Loan Co. v. Jennings*, 237 N.E.2d 305, 309-11 (Ohio 1968) (garnished funds held by court at time of bankruptcy constitute property of estate) (citing *Poon v. Todd (In re Corbin)*, 350 F.2d 514 (6th Cir. 1965)); *Van Wert Co. Hosp. v. French (In re Cummings)*, 266 B.R. 138, 142-44 (Bankr. N.D. Ohio 2001) (citing *Jennings*; *Corbin*; *In re Dodds*, 147 B.R. 719, 720 (Bankr. S.D. Ohio 1992); *Sininger v. Fulton (In re Sininger)*, 84 B.R. 115, 117 (Bankr. S.D. Ohio 1988)). However, if Ms. Plaughter received the funds prepetition, they would not constitute property of the estate, 11 U.S.C. § 541(a) (property of estate consists of debtor's interest as of commencement of case); *Cummings*, 266 B.R. at 143, unless and until they are recovered pursuant to a judgment in an adversary proceeding (which Trustee has not commenced) to avoid the transfer as a preference, 11 U.S.C. § 541(a)(3).

THEREFORE, for the foregoing reasons,

IT IS ORDERED that the Motion is denied, and it is

FURTHER ORDERED, pursuant to Rule 56(d) of the Federal Rules of Civil Procedure, made applicable in bankruptcy adversary proceedings by Rule 7056 of the Federal Rules of Bankruptcy Procedure, that the following facts appear without substantial controversy and shall be deemed established for the purposes of this proceeding: (1) that Debtor claims an interest in a 1991 Ford Explorer, that the vehicle is not exempt, and that Ms. Plaughter does not hold an interest in the vehicle; and (2) that, at some

point in time, Ms. Plaughner received the sum of \$3,074.99 from the Auglaize County Child Support Enforcement Agency, and it is

FURTHER ORDERED that there remain genuine issues regarding material facts including the following: (a) whether Debtor's 1991 Ford Explorer is titled in his name and was titled in his name at the time he filed his Chapter 7 petition; (b) whether the funds received by Ms. Plaughner from the Auglaize County Child Support Enforcement Agency were seized from Debtor's profit-sharing

plan; (c) whether Debtor's profit-sharing plan is held in trust; (d) whether the profit-sharing plan is ERISA-qualified, or is otherwise subject to transfer restrictions that are enforceable under applicable nonbankruptcy law; (e) the extent, if any, to which the funds in question (if seized from Debtor's profit-sharing plan) are attributable to Debtor's postpetition employment; (f) whether such funds were seized from assets held by the plan trustee or administrator or from distributions of such assets made or payable to Debtor; (g) when those funds were seized by or for Ms. Plaughner; and (h) the nature of the court order or other authorization for the seizure, and it is

FURTHER ORDERED that the court will conduct a status and scheduling conference at **11:45 a.m. on March 1, 2005**, at Courtroom 2, United States Courthouse, 1716 Spielbusch Avenue, Toledo, Ohio, to determine the further course of this adversary proceeding.

Mary Ann Whipple
United States Bankruptcy Judge