

THIS OPINION NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:)	Case No. 03-15888
)	
ARTHUR M. VOLPE,)	Chapter 7
)	
Debtor.)	Judge Pat E. Morgenstern-Clarren
)	
<hr/>		
MARVIN A. SICHERMAN, TRUSTEE,)	Adversary Proceeding No. 04-1495
)	
Plaintiff,)	
)	
v.)	<u>MEMORANDUM OF OPINION</u>
)	<u>REGARDING MOTION FOR</u>
UNION CAPITAL ESCROW)	<u>SUMMARY JUDGMENT</u>
CORPORATION, et al.,)	
)	
Defendants.)	

The chapter 7 trustee's complaint requests a determination that a real estate commission which the debtor was entitled to receive at the time he filed his chapter 7 case is property of the estate and also asks that the defendants' interests in the commission, if any, be determined. Of the four defendants, the rights of three have been resolved: Realty One agreed that it does not have an interest in the property and the trustee obtained a default judgment against the debtor Arthur Volpe and Union Capital Escrow Corporation. (Docket 32, 35). The trustee moves for summary judgment against the remaining defendant, Shelly Volpe, and Ms. Volpe opposes that request. (Docket 51, 53, 54). For the reasons set forth below, the trustee's motion is granted.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(E), (K) and (O).

FACTS¹

The debtor Arthur Volpe and defendant Shelly Volpe were divorced in 1999. The terms of their divorce are set forth in a domestic relations court judgment and the separation agreement which it incorporates. The Volpes jointly owned their marital home at 19471 Stoughton Road, Strongsville, Ohio (the property). Their separation agreement called for the immediate sale of the property with the debtor to serve as the listing agent, and included these related provisions:

5. Real Estate Tax Deficiency:

Husband shall be responsible for taxes, including any interest and penalties, that were due and payable during the period of temporary support; August 15th, 1997 to May 1st, 1999 . . . [.]

6. Real Estate Commissions:

Should Husband receive a real estate commission on the sale of the marital home, he shall pay one-half of the gross commission as and for additional spousal support² . . . [.]

The parties negotiated these terms and intended them to provide additional spousal support.³

The property was sold before the debtor filed his chapter 7 case, thus entitling him to receive a \$9,200.00 commission (the commission). At the time of the filing, Union Capital was

¹ These are the undisputed facts based on the pleadings and the evidence offered by the parties in connection with the summary judgment motion.

² Trustee's motion, exhs.

³ See Ms. Volpe's brief in opposition, exh. B (¶¶ 3, 9).

holding these funds. The chapter 7 trustee is now holding them in his trustee account. The trustee does not dispute that the debtor failed to pay the taxes referred to in the separation agreement.

DISCUSSION

The trustee argues that he is entitled to summary judgment that the commission is property of the estate, unencumbered by any lien, security interest or other interest held by Ms. Volpe. Ms. Volpe argues that because the debtor is contractually obligated to pay her one-half of the commission and is responsible for the delinquent real estate taxes, the commission is her property rather than property of the debtor's bankruptcy estate. Ms. Volpe also contends that the commission is not property of the estate because the debtor's obligation to pay the spousal support is a non-dischargeable debt under bankruptcy code § 523.

A. Summary Judgment

Summary judgment is appropriate only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c) (made applicable by FED. R. BANKR. P. 7056). *See also Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The movant must initially demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. at 323. The burden is then on the non-moving party to show the existence of a material fact which must be tried. *Id.* The non-moving party may oppose a proper summary judgment motion "by any of the kinds of evidentiary material listed in Rule 56(c), except the mere pleadings themselves" *Celotex Corp. v. Catrett*, 477 U.S. at 324. All reasonable inferences drawn from the evidence must be viewed in the light most favorable to the party opposing the motion. *Hanover Ins. Co. v.*

American Eng'g Co., 33 F.3d 727, 730 (6th Cir. 1994). Summary judgment may be granted when “the record taken as a whole could not lead a rational trier of fact to find for the non-moving party.” *Northland Ins. Co. v. Guardsman Prods., Inc.*, 141 F.3d 612, 616 (6th Cir. 1998) (quoting *Agristor Fin. Corp. v. Van Sickle*, 967 F.2d 233, 236 (6th Cir. 1992)).

B. Property of the bankruptcy estate

The chapter 7 estate includes “all legal and equitable interests of the debtor in property as of the commencement of the case.” 11 U.S.C. § 541(a)(1). Bankruptcy courts look to the state law of property rights unless there is a countervailing federal interest. *See Kitchen v. Boyd (In re Newpower)*, 233 F.3d 922, 928 (6th Cir. 2000). Under Ohio law, the commission is property of the estate based on the undisputed evidence that the debtor earned it before filing his bankruptcy case. *See Zoltanski v. Gagne (In re Gagne)*, 16 B.R. 24 (Bankr. N.D. Ohio 1981) (applying Ohio law and holding that a real estate commission which the debtor earned before filing the petition is property of the bankruptcy estate).

Ms. Volpe argues for a different conclusion. She asserts that the commission is her property based on the separation agreement. This argument fails, however, because the separation agreement and divorce decree do not give Ms. Volpe an interest in the commission.⁴ Instead, they create an obligation on the debtor’s part to pay those amounts to her. Ms. Volpe acknowledges this in her affidavit which states that the obligations were intended as support. She also adopts this characterization in her argument regarding the dischargeability of these

⁴ A divorce decree may effect a disposition of the property itself. *See for example, McCafferty v. McCafferty (In re McCafferty)*, 96 F.3d 192 (6th Cir. 1996) (a domestic relations award of a separate property interest in pension benefits to an ex-spouse did not become property of the debtor’s estate under 11 U.S.C. § 541(d)); *Wilson v. Wilson (In re Wilson)*, 158 B.R. 709, 711-13 (Bankr. S.D. Ohio 1993) (distinguishing between domestic relations court orders which divest a debtor of an interest in property from those which give rise to a debt). The undisputed facts make it clear that the decree did not effect a disposition of the commission.

obligations. The debtor's obligation to pay those amounts to Ms. Volpe does not give her a property interest in the commission.

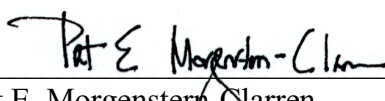
C. 11 U.S.C. § 523(a)(5)

Additionally, Ms. Volpe opposes summary judgment based on the argument that the debtor's obligations (with regard to the commission and the taxes) are support obligations which may not be discharged under § 523(a)(5). *See* 11 U.S.C. § 523(a)(5) (providing that certain debt owed to an ex-spouse "for alimony . . . , maintenance . . . , or support" is not dischargeable). This argument is not relevant to the question of whether the commission is property of the estate. A creditor who believes a debt is not dischargeable may bring an adversary proceeding for such a declaration; the right to file such a complaint does not give the creditor an interest in any particular property.

CONCLUSION

For the reasons stated above, the trustee is entitled to summary judgment on his complaint against Ms. Volpe. A separate order will be entered reflecting this decision.

Date: 20 May 2005



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

To be served by clerk's office email and the Bankruptcy Noticing Center

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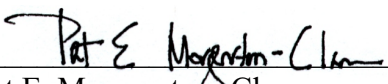


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)	<u>JUDGMENT</u>
UNION CAPITAL ESCROW)	
CORPORATION, et al.,)	
)	
Defendants.)	

For the reasons stated in the memorandum of opinion filed this same date, the plaintiff-trustee's motion for summary judgment is granted. (Docket 51). As a result, the plaintiff is granted judgment against defendant Shelly Volpe.

IT IS SO ORDERED.

Date: 20 May 2005



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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