

NOT FOR COMMERCIAL PUBLICATION

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION



|                         |   |   |
|-------------------------|---|---|
| In re:                  | ) | Case No. 05-90361                         |
|                         | ) |   |
| JAMES SUTTON,           | ) | Chapter 7                                 |
|                         | ) |   |
| Debtor.                 | ) | Judge Pat E. Morgenstern-Clarren          |
| _____                   | ) |   |
|                         | ) |   |
| SHELDON STEIN, TRUSTEE, | ) | Adversary Proceeding No. 07-1090          |
|                         | ) |   |
| Plaintiff,              | ) |   |
|                         | ) |   |
| v.                      | ) | <b><u>MEMORANDUM OF OPINION</u></b>       |
|                         | ) | <b><u>DENYING THE DEBTOR’S MOTION</u></b> |
|                         | ) | <b><u>FOR LEAVE TO INTERVENE AND</u></b>  |
| BERNICE MILTON,         | ) | <b><u>JOINDER AS NEW PARTY</u></b>        |
|                         | ) | <b><u>DEFENDANT</u></b>                   |
| Defendant.              | ) | (NOT FOR COMMERCIAL PUBLICATION)          |

The debtor James Sutton moves to intervene or to be joined as a new defendant in this preference action brought by the trustee against Bernice Milton. (Docket 19). The trustee opposes the request. (Docket 20). For the reasons stated below, the debtor’s motion is denied.

**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 adversary proceeding is a core proceeding under 28 U.S.C. § 157(b)(2)(F).<sup>1</sup>

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<sup>1</sup> In the court’s view, the value of this opinion is solely to decide the dispute between the parties, rather than to add anything to the general bankruptcy jurisprudence. For that reason, the opinion is not intended for commercial publication.

## DISCUSSION

The trustee filed a complaint to avoid and to recover a \$4,000.00 transfer which the debtor made to Bernice Milton before he filed his chapter 7 case. The complaint is brought under bankruptcy code §§ 544, 547 and 551.<sup>2</sup> The debtor seeks to intervene or to be joined as a party so that he may advocate this position: He received payments from his Ford/UAW ERISA<sup>3</sup> qualified retirement benefits which were deposited into his checking account with National City Bank. He used that account to pay the disputed funds to Ms. Milton. He argues that because the funds originally came from his retirement benefits, the transferred property is excluded from the bankruptcy estate under bankruptcy code § 541(c)(2) (providing that an ERISA restriction on transfer of a debtor's beneficial interest in a trust is enforceable under title 11). *See* 11 U.S.C. § 541(c)(2); and *Patterson v. Shumate*, 504 U.S. 753, 760 (1992) (holding that the anti-alienation provision required for ERISA qualification “constitutes an enforceable transfer restriction for purposes of § 541(c)(2)’s exclusion of property from the bankruptcy estate[.]”).

The debtor claims an absolute right to intervene on the ground that this proceeding jeopardizes the exclusion of his retirement proceeds from the chapter 7 estate. If his motion is granted, he will raise as a defense that the transferred property “was excludable from the property of the bankruptcy estate under § 541(c)(2) and the transfer did not diminish the [d]ebtor’s estate.”

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<sup>2</sup> The debtor’s bankruptcy case was filed before October 17, 2005, the effective date of most of the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23. The citations, therefore, are to the bankruptcy code as it existed before that date.

<sup>3</sup> Employment Retirement Income Security Account (ERISA).

## Intervention of Right

Third party “intervention of right” is governed by FED. R. CIV. P. 24 which applies to this adversary proceeding under FED. R. BANKR. P. 7024. Rule 24 states:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

FED. R. CIV. P. 24(a). The debtor claims that ERISA, a federal statute, gives him the unconditional right to intervene under rule 24(a)(1). The debtor also argues that he has an interest in the subject of this action which gives him the right to participate. Although the debtor cites rule 19 joinder as the basis for this second argument, the court will treat it as a request to intervene under rule 24(a)(2), as that is the appropriate procedural basis for a non-party to bring himself into a proceeding. *See generally* 4 JAMES WM. MOORE, ET AL., MOORE’S FEDERAL PRACTICE § 19.02[5][c] (3d ed. 2007) (noting that intervention, rather than joinder, is the process by which an individual brings himself into a pending case).

### **1. Federal Rule of Civil Procedure 24(a)(1)**

ERISA provides that an individual, such as a pension plan beneficiary, may file an action to “enjoin any act or practice” that violates ERISA, the terms of an ERISA-qualified plan, or which would disqualify a plan from coming within the ambit of ERISA. 29 U.S.C. § 1132(a)(3). As noted above, the debtor claims that the challenged transfer was made from pension benefits previously paid to him from an ERISA-qualified plan, and that the trustee’s attempt to recover the transfer jeopardizes the debtor’s position that his pension funds are excluded from the

bankruptcy estate under ERISA. As a result, he argues, ERISA gives him an unconditional right to intervene.

The debtor's argument is misplaced because the trustee is not attempting to recover the debtor's interest in an ERISA-qualified plan. He is instead attempting to recover cash which the debtor transferred to Ms. Milton. Pension funds which have been distributed to a debtor and then transferred by the debtor to a third party are not protected by ERISA. See *Yoppolo v. Fifth Third Bank of NW Ohio (In re Bostic)*, 171 B.R. 270, 273 (Bankr. N.D. Ohio 1994) (noting that there was no statutory protection under ERISA with respect to funds which a debtor had withdrawn from a protected plan and transferred to a third party). Therefore, although ERISA may confer a right to intervene based on a potential violation of its anti-alienation provision, there is no such violation here because the funds at issue were distributed by the plan to the debtor before the debtor transferred them to the defendant. As a result, the statute cited by the debtor does not confer an unconditional right to intervene.

The decision in *McLean v. Central States, Southeast & Southwest Areas Pension Fund*, 762 F.2d 1204 (4<sup>th</sup> Cir. 1985) which the debtor cites, does not support a different result because it involves a different issue. In *McLean*, the Fourth Circuit reversed a decision requiring a pension fund to pay to a chapter 13 trustee funds that were owed to the debtor, finding that the pension funds were subject to an enforceable transfer restriction and were not estate property. The trustee here is not seeking to recover funds directly from the debtor or from the debtor's pension benefits. He is instead seeking to recover funds that were (1) distributed to the debtor from a pension fund, and which (2) the debtor then transferred to his creditor.

## 2. Federal Rule of Civil Procedure 24(a)(2)

The debtor's alternative argument to participate based on his interest in the subject matter of the proceeding is equally unavailing. Under rule 24(a)(2), a party may qualify for intervention in the absence of a statute, if he can satisfy these four elements: "(1) timeliness of application; (2) a substantial legal interest in the case; (3) impairment of the applicant's ability to protect that interest in the absence of intervention; and (4) inadequate representation of that interest by parties already before the court." *Northeast Ohio Coal. for Homeless and Serv. Employees Int'l Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1007 (6<sup>th</sup> Cir. 2006) (citing *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6<sup>th</sup> Cir. 1997)).

The debtor's stated reason to intervene is to advance his position that his retirement funds are excluded from the bankruptcy estate. His motion fails under rule 24(a)(2), however, because his retirement funds are not the subject of this proceeding. The subject is the transfer made to Ms. Milton and whether that transfer can be recovered for the benefit of creditors. Once the debtor transferred the funds to Ms. Milton, he had no legal stake in them. Moreover, his intervention is not necessary to advance his position regarding the transfer because Ms. Milton has filed an answer which mirrors the answer which the debtor wishes to file. Although the debtor does have a substantial legal interest in his remaining retirement funds and whether those funds are property of the chapter 7 estate, that issue is not the subject of this adversary proceeding and his absence from this adversary proceeding will not impair his ability to protect or defend it.

**CONCLUSION**

For the reasons stated, the debtor's motion is denied. The court will enter a separate order memorializing this decision.



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Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

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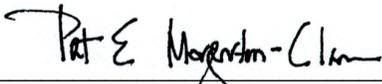
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|                         | ) |                                  |
| BERNICE MILTON,         | ) |                                  |
|                         | ) |                                  |
| Defendant.              | ) |                                  |

For the reasons stated in the memorandum of opinion filed this same date, the debtor's motion to intervene or to be joined as a new defendant in this preference action brought by the trustee against Bernice Milton is denied. (Docket 19).

IT IS SO ORDERED.

  
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 Pat E. Morgenstern-Clarren  
 United States Bankruptcy Judge