

NOT FOR COMMERCIAL PUBLICATION

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

**FILED**  
**08 NOV 26 AM 10:35**  
CLERK U.S. BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
CLEVELAND

In re:	)	Case No. 08-14392
	)	
JUAN E. ROSARIO, JR. and	)	Chapter 7
STACEY I. ROSARIO,	)	
	)	Judge Pat E. Morgenstern-Clarren
Debtors.	)	
	)	<b><u>MEMORANDUM OF OPINION</u></b>

In the two months before Juan and Stacey Rosario filed their chapter 7 bankruptcy case, Mrs. Rosario made three relatively large cash withdrawals from her checking account. The chapter 7 trustee argues that the debtors had this cash on hand at the time of filing and moves to require the debtors to turn over the funds to him for administration. The debtors contend that they have accounted for how they spent the money prepetition and deny having any of it at the time of filing. For the reasons stated below, the trustee did not meet his burden of proof and the 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 is a core proceeding under 28 U.S.C. § 157(b)(2)(E).

## **FACTS<sup>1</sup>**

### **I. The Evidentiary Hearing**

The court held an evidentiary hearing on November 20, 2008. The trustee presented his case through his own testimony, cross-examination of Mrs. Rosario, and exhibits. The debtors presented their case through the testimony of Mrs. Rosario, cross-examination of the trustee, and exhibits.

These findings of fact are based on that evidence and reflect the court's weighing of the evidence presented, including determining the credibility of the witnesses. "In doing so, the Court considered the witnesses' demeanor, the substance of the testimony, and the context in which the statements were made, recognizing that a transcript does not convey tone, attitude, body language or nuance of expression." *In re The V Companies*, 274 B.R. 721, 726 (Bankr. N.D. Ohio 2002). *See* FED. R. BANKR. P. 7052 (incorporating FED. R. CIV. P. 52 and applicable in contested matters under FED. R. BANKR. P. 9014). When the court finds that a witness's explanation was satisfactory or unsatisfactory, it is using this definition:

The word satisfactory may mean reasonable, or it may mean that the Court, after having heard the excuse, the explanation, has that mental attitude which finds contentment in saying that he believes the explanation—he believes what the [witness] says with reference to the [issue at hand]. He is satisfied. He no longer wonders. He is contented.

*United States v. Trogon* (*In re Trogon*), 111 B.R. 655, 659 (Bankr. N.D. Ohio 1990) (internal citation and quotation omitted).

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

## **II. The 11 U.S.C. § 341 meeting and related events**

The debtors Juan and Stacey Rosario filed their chapter 7 case on June 10, 2008. The filing showed that Mrs. Rosario was employed as an accounts receivable coordinator and that Mr. Rosario was a salesman at Chrysler Jeep of North Olmsted. They had a combined average monthly income of \$7,315.67 and average monthly expenses of the same amount.

By letter dated June 13, 2008, chapter 7 trustee Sheldon Stein directed debtors' counsel Susan Gray to provide certain financial documents to him no later than seven days before the meeting of creditors set for July 7, 2008.<sup>2</sup> By letter dated June 27, 2008, debtors' counsel sent some documents to the trustee, including KeyBank statements for Mrs. Rosario's checking account for: (1) February 27, 2008–March 26, 2008; (2) March 26, 2008–April 24, 2008; and (3) April 24, 2008–May 27, 2008, together with (4) a computer printout for the account for May 28, 2008–June 10, 2008. The statements showed that Mrs. Rosario withdrew these amounts prepetition, in cash,<sup>3</sup> from the account:

April 7, 2008 \$5,006.50

May 12, 2008 \$3,800.00

June 4, 2008 \$2,701.00

The meeting of creditors went forward on July 7, 2008, at which time the trustee questioned the debtors about the first two withdrawals.<sup>4</sup> With respect to the \$5,006.50

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<sup>2</sup> See 11 U.S.C. § 341.

<sup>3</sup> The statements show that Mrs. Rosario wrote three counter checks to herself, which all parties agree resulted in the bank giving her cash for the amount of the checks.

<sup>4</sup> Debtors' exhibit L.

withdrawal, Mr. Rosario testified that they used the money to pay \$2,300.00 for rent, \$900.00 in car payments, and about \$300.00 for groceries. With respect to the \$3,800.00 withdrawal, Mrs. Rosario testified that they used it to pay rent and \$900.00 to a moving company.<sup>5</sup> The trustee requested supporting documentation from Mona Rubenstein, the attorney who was standing in for debtors' counsel, and adjourned the examination to August 4, 2008.

By three emails dated August 2, 2008, debtors' counsel sent the trustee these additional documents in response to the request made at the examination:

- (1) the front of the drawee's copy of a Huntington National Bank cashier's check dated June 5, 2008 payable to "Brig Connections LLC" in the amount of \$2,384.00;
- (2) a rental agreement dated April 10, 2008 between the Rosarios and "LL Briggs" calling for the debtors to rent property in Broadview Heights, Ohio starting on May 5, 2008 at \$2,300.00 a month. The agreement provided that the Rosarios would pay the first month's rent and a security deposit of one month's rent. The document shows that they actually paid \$2,300.00 for the first month's rent, \$2,300.00 for the last month's rent, and \$500.00 for a security deposit;<sup>6</sup> and
- (3) copy of receipts dated May 9, 2008 from Chrysler Jeep of North Olmsted for \$927.00 for two car payments.

On August 4, 2008, the trustee again questioned the debtors about the cash withdrawals.<sup>7</sup> By way of background, the debtors owned two houses prepetition; they lived in one and rented the other to a third-party at the rate of \$2,100.00 a month. The debtors had not made payments

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<sup>5</sup> At trial, Mrs. Rosario testified that the trustee prevented her from fully explaining how they had used the funds. The transcript is inconclusive on this point.

<sup>6</sup> Plaintiffs' exh. G.

<sup>7</sup> It appears that an attorney other than Susan Gray represented the debtors at that hearing, but the attorney's name does not appear in the transcript. Plaintiff's exh. M at p. 8, lines 24-5.

on the notes that secured the mortgages on the houses for quite some time, and both were in foreclosure. Shortly before the debtors filed their chapter 7 case, they signed a lease for a different house and moved into it. At the adjourned § 341 hearing, the trustee returned to the issue of the April 7, 2008 withdrawal of \$5,006.50 which Mr. Rosario had testified was used in part for rent. Specifically, the trustee asked the debtors to explain why the rental agreement stated that they paid \$5,100.00 when they signed the lease, but the amount withdrawn from the checking account was \$5,006.50. Although the answers given are not entirely clear, it appears that the debtors responded that Mrs. Rosario withdrew everything that was in the account (i.e. \$5,006.50) because creditors were attempting to garnish their funds.<sup>8</sup> The debtors then kept the cash until they gave it to the landlord. With respect to the second withdrawal—\$3,800.00 on May 12, 2008—the debtors testified that they used it to make car payments and pay June rent. With respect to the third withdrawal of \$2,701.00 on June 4, 2008, the debtors testified that they used the money for rent. At the end of the examination, the trustee advised the debtors that he would be seeking a return of certain money from their landlord and also a turnover of at least part of the cash withdrawn from Mrs. Rosario's bank account.<sup>9</sup>

The trustee then filed a motion for turnover seeking delivery to the estate of \$11,507.50. By letter dated September 2, 2008, debtors' counsel provided the trustee with a spread sheet prepared by Mrs. Rosario with additional information about the family's expenses for the time period in which the cash was withdrawn from the bank. The spread sheet, which addressed the

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<sup>8</sup> Plaintiffs' exh. M at 6.

<sup>9</sup> The trustee subsequently recovered \$2,000.00 for the estate from the landlord through a negotiated settlement with the landlord's counsel.

family's expenses for April through June 2008, did not alleviate the trustee's concerns. When the trustee reviewed the spread sheet, he noted that the lease for the rental housing started in May, but the debtors claimed a rent expense in April. He also noted that the child care expenses on the spread sheet were considerably less than the debtors had scheduled. Ultimately, the matter went to trial on the trustee's amended motion for turnover and the debtors' objection to it.

### **III. Additional Trial Testimony**

The trustee testified at trial that he pursued the cash withdrawal issue because several aspects of the debtors' filing caught his attention: they had retained bankruptcy counsel about a year before they filed their case; they had about \$2,000.00 per month excess of income over expenses until very shortly before they filed their case; they owned two houses, both of which were the subject of foreclosure proceedings; they did not deposit their tenant's March \$2,100.00 rent check into Mrs. Rosario's KeyBank account; their schedule I income and schedule J expenses matched each other to the penny, with the expenses appearing to be inflated; the dates on the car receipts did not support the debtors' testimony that they had used part of the May 12, 2008 withdrawal to make their car payments because the receipt was dated three days *before* the cash was withdrawn; the KeyBank statement showed that the debtors had paid their \$920.00 in moving expenses by debit card on May 9, 2008, so their testimony that they used some of the cash to pay for that expense did not square with the document; and there was no explanation for why the debtors withdrew about \$5,000.00 in cash from one account (KeyBank), kept it for a few days, and then purchased a cashier's check with it from a different bank (Huntington). On the housing point, the trustee noted that the debtors had not made a mortgage payment on either property in "years," and yet one generated \$2,100.00 a month in rental income and they had lived

in the other one rent-free until about a month before the filing. He concluded that the debtors did not use the cash withdrawals in the manner stated, but thought that the facts instead showed that the debtors had positive cash flow until they filed their petition, that they used that cash flow to pay the rent and the car expenses, and that the debtors had the \$11,507.50 in cash in their possession at the time of filing.

At trial, Mrs. Rosario testified further about the cash withdrawals. One issue was whether the documentation provided to the trustee really showed that she had used part of the cash withdrawn on May 12, 2008 to make the car payments when the receipt showed that the payments were made three days earlier on May 9, 2008. Mrs. Rosario testified that they have two car payments, one for about \$300.00 and the other for about \$600.00. Mr. Rosario made the payments at the Chrysler Jeep dealership where he is employed. The dealership “got it [the payment] started” by posting the payment on May 9, 2008 before receiving the money; Mr. Rosario then brought the cash in to the dealership on about May 12, 2008 after Mrs. Rosario withdrew it from the bank. This seems like an odd procedure to the court, but the trustee did not challenge the testimony and the court accepts for purposes of this opinion that this is how the events unfolded.

On the issue of the cashier’s check, Mrs. Rosario testified that she wanted to have a “paper trail” for the rent, so she took the cash and met the landlord at Huntington, which is where he banked. Again, the testimony was not entirely clear, but it seems that once at Huntington she converted the cash into the cashier’s check and gave the check to the landlord.

Finally, Mrs. Rosario addressed the child care expenses, which were scheduled at \$475.00 a month, but listed in her spread sheet at \$184.00 a month for May. She stated that

some of the expenses listed on the spread sheet were actual expenses and others were projected. The lower child care number represented the discounted amount that she had paid earlier, while the \$475.00 is the cost that she anticipated being required to pay going forward.

### **ISSUE**

Did the trustee prove that the debtors had the cash from the three withdrawals in their possession at the time of the bankruptcy filing, such that the money is property of the estate that must be turned over to the trustee for administration and distribution to creditors?

### **DISCUSSION**

A chapter 7 estate generally consists of “all legal or equitable interests of the debtor in property as of the commencement of the case.” 11 U.S.C. § 541(a)(1). Money that the debtor has on hand at the time of filing is property of the estate, although the debtor is entitled to certain exemptions. 11 U.S.C. § 522. A debtor has a duty to surrender property of the estate to the trustee. 11 U.S.C. § 521(a)(4). The chapter 7 trustee may file a turnover action against any entity in possession of estate property, including the debtor. 11 U.S.C. § 542(a). With exceptions set out in the bankruptcy code, property transferred by the debtor prepetition is not property of the estate and is, therefore, not subject to a turnover action. *In re Todd*, 359 B.R. 863, 864 (Bankr. N.D. Ohio 2007).

The trustee has the burden of proof by a preponderance of the evidence. *In re Danowski*, 320 B.R. 886, 887 (Bankr. N.D. Ohio 2005). If the trustee establishes at least a prima facie case, the burden of persuasion shifts to the debtors to explain or otherwise go forward. *Evans v. Robbins*, 897 F.2d 966, 968 (8th Cir. 1990); *In re Danowski*, 320 B.R. at 887. The ultimate burden of proof, however, always remains with the trustee. *Evans*, 897 F.2d at 968; *In re*



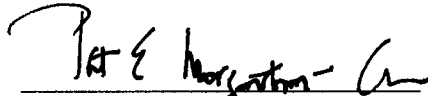
*Danowski*, 320 B.R. at 887.

The court finds that the trustee did not prove that the debtors had all or part of the cash withdrawals in hand at the time of filing. The debtors did give incomplete, and in some instances inconsistent, explanations for how they used the money both in their § 341 examination and in communications between counsel. At trial, however, the debtors finally provided a reasonable explanation regarding their use of the cash. Ultimately, the trustee's evidence was too thin to support his burden of showing that the debtors had the cash at the time they filed their bankruptcy case.

### **CONCLUSION**

The chapter 7 trustee did not prove that the debtors had undisclosed cash on hand at the time of filing that is property of the estate to be turned over to the trustee. The trustee's motion is, therefore, denied.

The court will enter a separate order reflecting this decision.

  
Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

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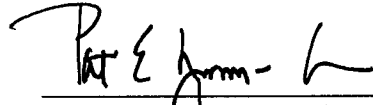
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Debtors.	)	
	)	<b><u>ORDER</u></b>

The chapter 7 trustee's amended motion for turnover of property is denied for the reasons stated in the memorandum of opinion entered this same date. (Docket 14, 52).

IT IS SO ORDERED.

  
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Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge