

IT IS SO ORDERED.

**Dated: September 02, 2009
09:16:31 AM**



**Honorable Kay Woods
United States Bankruptcy Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO**

IN RE:	*	
	*	
	*	CASE NUMBER 07-40529
	*	
NICHOLAS M. GARRITANO,	*	CHAPTER 7
	*	
Debtor.	*	HONORABLE KAY WOODS
	*	

**MEMORANDUM OPINION REGARDING AMENDED
MOTION FOR TURNOVER OF PERSONAL PROPERTY**

This cause is before the Court on Amended Motion for Turnover of Personal Property ("Motion for Turnover") (Doc. # 33) filed by Michael D. Buzulencia, Chapter 7 Trustee ("Trustee"), on April 9, 2009. Debtor Nicholas M. Garritano ("Debtor") filed Response to Amended Motion for Turnover of Personal Property ("Response") (Doc. # 35) on April 24, 2009. The Court held a hearing on the Motion for Turnover on June 4, 2009 ("Hearing"). At that time, the Court requested the parties to brief their positions and submit simultaneous briefs on or before August 7, 2009. At the

request of the parties, the Court extended the time for filing briefs until August 21, 2009.

Debtor filed Brief, [sic] Re: Trustee's Motion for Turnover ("Debtor's Brief") (Doc. # 43) on August 20, 2009. Trustee filed Memorandum in Support of Turnover of Personal Property ("Trustee's Brief") (Doc. # 44) on August 20, 2009. Based upon the Motion for Turnover, Response, Debtor's Brief, Trustee's Brief and the representations of counsel at the Hearing, the Court finds that it is appropriate to grant the Motion for Turnover, in part, as set forth below.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general order of reference (General Order No. 84) entered in this district pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408, and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The following constitutes the Court's findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

I. FACTUAL BACKGROUND AND ARGUMENTS

Debtor filed a voluntary petition pursuant to chapter 7 of the Bankruptcy Code on March 15, 2007 ("Petition Date"). Debtor is a medical doctor with an OB/GYN practice. Debtor's schedules, which were filed on March 27, 2007 (Doc. # 10), list the following personal property on Schedule B: (i) Dr. Nicholas M. Garritano Inc. 100%, valued at \$0.00; and (ii) Surgery [sic] center [sic] at

Southwoods .05[%], valued at \$0.00.

Debtor admits that he owns .05% ("Shares") of the Surgery Center at Southwoods ("Surgery Center"), but he asserts there are restrictions on the transfer of such Shares because "only a surgeon can be an owner of [the Shares] and that one-third of all of the owner's medical practice must be done at the Surgery Center." (Resp., ¶ 1.) In addition, Debtor represents that the Shares must first be offered to Ed Muransky, the manager of the Surgery Center, and that "[a]ny physician who would be interested is already working [at the Surgery Center], and therefore, would have no interest in purchasing the shares." (*Id.*, ¶ 3.) At the Hearing, Trustee withdrew the request for turnover of the Shares, but pressed the motion for turnover of dividends ("Dividends") in the amount of \$24,000.00.

Trustee seeks turnover of \$24,000.00, based on Debtor's testimony at the First Meeting of Creditors pursuant to 11 U.S.C. § 341 that, subsequent to the Petition Date, he received \$24,000.00 in Dividend payments based upon the Shares. (Mot. for Turnover, ¶ 3.) Trustee argues that the Shares are property of the bankruptcy estate, as defined in § 541 of the Bankruptcy Code, which provides:

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

* * *

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

11 U.S.C. § 541 (West 2009). Trustee asserts that the Shares are property of the estate pursuant to § 541(a)(1) even though there is a restriction on transfer of such Shares. (Trustee's Br. at 2-3.)

As a consequence, even though Trustee no longer seeks turnover of the Shares themselves, Trustee contends that the Dividends constitute property of the estate under § 541(a)(6). (*Id.* at 4-5.)

Debtor acknowledges that, as a result of his ownership of the Shares, he is entitled to receive Dividends and that he did, in fact, receive a Dividend in the amount of \$3,000.00 on April 11, 2007. (Debtor's Br. at 2.) Debtor also asserts that "there was a payment on January 31, 2007 which was prepetition and thus, not an asset of the estate." (*Id.* at 2.)

II. ANALYSIS

The Court first finds that the Shares are property of Debtor's bankruptcy estate. Debtor had a legal or equitable interest in the Shares as of the Petition Date. As such, the Shares fall squarely within the definition of property of the estate, as set forth in § 541. Indeed, Debtor does not contend otherwise; he merely asserts that the Shares have "a zero value." (Resp. at 1.) Recognizing the restrictions on transfer, Trustee has abandoned his effort to have Debtor turn the Shares over to him.

The question of whether the Dividends are property of the estate is more complicated. Trustee argues that all monies received after the Petition Date are proceeds of the Shares and, thus, are property of the estate under § 541(a)(6). Without identifying when cessation occurred and/or for what period, Debtor counters that Dividends ceased post-petition and, in any event, would be offset by assessments against Debtor, as an owner of the Shares of the Surgery Center.¹ (Resp., ¶ 4.)

The problem here is that the Shares are not on the same footing as most shares of corporate stock. Debtor's right to receive Dividends required him to be more than a mere record owner of the shares; he was required to perform services at the Surgery Center in exchange for ownership of the Shares. In return for performing services at the Surgery Center and using the Center's facilities, Debtor received Dividends.² As a consequence, the Dividends are not based merely on stock *ownership*.

In the present case, the Dividends do not fit precisely within the definition of property of the estate in § 541(a)(6). Proceeds from property of the estate are included as property of the estate except to the extent they are earnings received for services

¹ Trustee did not explore this argument. There was no evidence whether Dividends actually ceased or whether Debtor is merely assessed other fees as a result of his ownership of the Shares, which can be paid in whole or in part with the Dividends.

² Debtor acknowledged that he received Dividends on January 31, 2007, and April 7, 2007. These Dividends appear to be for the last quarter of 2006 (received at the end of January 2007) and the first quarter of 2007 (received in April 2007), respectively.

performed post-petition. Conversely, proceeds of property of the estate based on earnings for services performed pre-petition are property of the estate. The Dividends in question are based, at least in part, upon Debtor's performance of services. As such, as of the Petition Date Debtor had a contingent right to receive Dividends based on performance of pre-petition medical services at the Surgery Center. As a consequence, this Court finds instructive other cases that have dealt with post-petition payments based on contingent rights as of the petition date.

In *Booth v. Vaughan (In re Booth)*, 260 B.R. 281 (B.A.P. 6th Cir. 2001), the Sixth Circuit Bankruptcy Appellate Panel ("BAP") reviewed case law in this circuit concerning when a debtor's interest in property constitutes property of the bankruptcy estate. The BAP noted that the following types of property were held to be property of the bankruptcy estate: (i) debtor's contingent right to a post-petition employment termination payment under a pre-petition employment agreement; (ii) debtor's interest in her husband's separately titled property that was contingent on the outcome of their pending divorce case; (iii) debtor's contingent claim against a third party; (iv) debtor's right to receive property, contingent on surviving others; (v) debtor's contingent interest in an earnest money deposit in an escrow account; (vi) an attorney debtor's right to legal fees under a contingent fee agreement with a client; (vii) debtor's contract right to commissions attributable to insurance policies sold pre-petition, but paid post-petition,

whether or not vested or contingent upon future services; (viii) debtor's right to a refund of a deposit made pursuant to a residential life use fee agreement, contingent on the debtor moving out of the residence before a stated time; (ix) debtor's interest in a stock option that was contingent on post-petition employment; and (x) debtor's future interest in lottery winnings. *Id.* at 286-87.

The BAP noted, "This review of the cases demonstrates two significant points. First, the array of circumstances in which the cases have held that a contingent interest is property of the estate is extensive. Second, the uniformity of the results in these cases is compelling." *Id.* at 287. The BAP held that the profit sharing payment received post-petition in *Booth* was property of the bankruptcy estate to the extent that it was based upon debtor's pre-petition employment.

The Panel agrees with the bankruptcy court that in the present case, the Debtor's profit sharing payment was sufficiently rooted in his prepetition past to be included in property of his bankruptcy estate under § 541(a).

The bankruptcy court prorated the profit sharing so that only that portion of the profit sharing that related to the Debtor's prepetition employment became property of the estate. This is entirely appropriate when only part of the payment is based upon prepetition conduct. See *Jess v. Carey (In re Jess)*, 215 B.R. 618, 621 (B.A.P. 9th Cir. 1997), *aff'd*, 169 F.3d 1204 (9th Cir. 1999); *Towers v. Wu (In re Wu)*, 173 B.R. 411, 415 (B.A.P. 9th Cir. 1994).

Id. at 290.

Although not precisely on point, this Court is persuaded by the reasoning of the Sixth Circuit BAP that the Dividend paid to Debtor

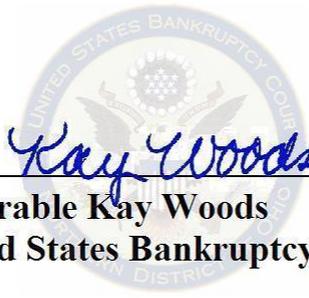
after the Petition Date - on or about April 11, 2007 - constitutes property of the bankruptcy estate because such Dividend is sufficiently rooted in Debtor's pre-petition past. Debtor "earned" the Dividend based on services he performed pre-petition, which contributed to the profitability of the Surgery Center during the first quarter of 2007. Because the Petition Date is March 15, 2007, approximately five-sixths of the Dividend is attributable to the pre-petition period. Accordingly, the Court finds that the Dividend should be pro-rated based on services performed pre-petition and that such pro-rated amount, as property of the estate, should be turned over to Trustee. The Court rejects Trustee's request for turnover of Dividends "earned" for services performed post-petition.

An appropriate order will follow.

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IT IS SO ORDERED.

**Dated: September 02, 2009
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Kay Woods

Honorable Kay Woods
United States Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO**

IN RE:

**NICHOLAS M. GARRITANO,

Debtor.**

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 * **CASE NUMBER 07-40529**
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 * **CHAPTER 7**
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 * **HONORABLE KAY WOODS**
 *

ORDER TO TURN OVER PROPERTY OF THE ESTATE TO TRUSTEE

For the reasons set forth in this Court's Memorandum Opinion entered on this date, the Court hereby finds and holds that: (i) a portion of the Dividend paid to Debtor after the Filing Date - on or about April 11, 2007 - constitutes property of the bankruptcy estate because it is sufficiently rooted in Debtor's pre-petition past; (ii) Debtor "earned" the Dividend, paid on April 11, 2007, based on services he performed pre-petition, which contributed to the profitability of the Surgery Center during the first quarter of 2007; (iii) the Dividend shall be pro-rated based on services

performed pre-petition, with such pro-rated amount constituting property of the estate; (iv) Debtor is ordered to turn over the pro-rated amount of the April 11, 2007, Dividend to Trustee; and (v) Trustee's request for turnover of Dividends "earned" based on services performed post-petition is denied.

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