

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION



In re: ) Case No. 09-18457  
 )  
MICHAEL J. CASELLA, JR., ) Chapter 7  
 )  
Debtor. ) Judge Pat E. Morgenstern-Clarren  
 )  
 ) **MEMORANDUM OF OPINION**

An individual chapter 7 debtor is required to list all of his assets in his bankruptcy filing and is then permitted to claim some of those assets as exempt so that he may have the means to make a fresh economic start. Parties in interest have 30 days from defined events to object to the exemptions. The question presented here is this: When a debtor properly claimed an interest in an asset as exempt, and the chapter 7 trustee did not object to that exemption within the time specified in the Bankruptcy Rules, may the debtor later change his mind and select a different asset to exempt?

The trustee says that the debtor may not; the debtor argues that he may, subject only to bad faith or prejudice limitations not at issue here. For the reasons stated below, the court finds that the trustee did not meet his burden of proving that the exemption should be disallowed. The trustee's objection to claim of exemption is overruled,<sup>1</sup> and his motion to turn over funds<sup>2</sup> is granted in the uncontested amount of \$1,001.31, only, and denied as to the balance of the funds sought.

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<sup>1</sup> Docket 22.

<sup>2</sup> Docket 16.

## **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)(B) and (E).

## **FACTS**<sup>3</sup>

The debtor Michael Casella filed his chapter 7 bankruptcy case on September 8, 2009. His schedule B assets included a contingent and unliquidated claim against his employer. On his schedule C exemptions, the debtor listed the current value of this asset as “unknown” and stated the value of the claimed exemption as \$1,075.00. He identified Ohio Revised Code § 2329.66(A)(18), the wild card exemption, as the law providing the exemption. The debtor stated in schedule B that his assets did not include any tax refunds owed to him, although in schedule I he disclosed that part of his monthly income was made up of federal and state tax refunds.

The chapter 7 trustee held and concluded the meeting of creditors<sup>4</sup> on October 15, 2009. The next day, he filed an Initial Report that included as estate assets 2009 federal and state tax refunds.<sup>5</sup> The trustee did not object to any of the debtor’s exemption claims within 30 days after concluding the meeting of creditors.

Several months later, the trustee moved for an order directing the debtor to turn over \$2,241.81, which he described as the full amount of the prepetition tax refunds owed to the

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<sup>3</sup> The facts are not disputed.

<sup>4</sup> See 11 U.S.C. § 341(a).

<sup>5</sup> Docket 8.

debtor.<sup>6</sup> In response, the debtor acknowledged that the refunds are estate property and stated that he was amending his schedules to claim exemptions in those funds under Ohio Revised Code § 2329.66(A)(18) (\$1,075.00) and § 2329.66(A)(3) (\$165.50), while agreeing that the remaining funds should be turned over to the trustee.<sup>7</sup> The debtor filed amended schedules B, C, E, and summary of schedules in which he listed the tax refunds as an asset.<sup>8</sup> A few days later, the debtor again amended his schedule C exemptions to delete his claim against his employer and instead to claim exemptions in the tax refunds as described above.<sup>9</sup> In effect, he swapped the previously-exempted employer claim under (A)(18) for the tax refund claim under the same section.

The trustee agrees that the debtor may amend his schedules to claim \$165.50 of the refunds as exempt under (A)(3) because the debtor had not previously used all of that exemption.<sup>10</sup> He objects, however, to the debtor's amended claim of exemption under (A)(18) and stands by his turnover motion. The sole dispute, therefore, is whether the debtor is entitled to exempt \$1,075.00 of his tax refund at this point in the case.<sup>11</sup>

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<sup>6</sup> Docket 16.

<sup>7</sup> The debtor agrees that the remainder is subject to turnover, but misstates that amount as \$876.17. *See* docket 19. As the tax refund amount is \$2,241.81 and the asserted exemptions total \$1,240.50, the undisputed amount is actually \$1,001.31.

<sup>8</sup> Docket 18.

<sup>9</sup> Docket 21.

<sup>10</sup> Ohio Revised Code § 2329.66(A)(3) permits a debtor to exempt an interest not to exceed \$400.00 in cash on hand, among other related items. The debtor earlier claimed exemptions under this section totaling \$234.50, leaving a balance of \$165.50.

<sup>11</sup> Although not expressly stated, presumably the tax refunds have a greater value to each party than the unliquidated, contingent employer claim. Hence the dispute.

### **THE POSITIONS OF THE PARTIES**<sup>12</sup>

The trustee contends that a debtor's interest in an asset claimed as exempt is removed from the estate if the trustee does not object within the 30 days provided in Bankruptcy Rule 4003(b)(1). Applying this analysis, the debtor's interest in the employer claim was removed from the estate 30 days after the meeting of creditors held on October 15, 2009, at which point the debtor's interest in the asset reverted in the debtor. After that, the trustee argues, the exemption had been used and could not be applied to the tax refunds. Additionally, once the debtor's interest in the employer claim was removed from the estate, there is no mechanism in the Bankruptcy Code for the debtor unilaterally to return it.

The debtor does not directly address the removal and return argument made by the trustee. Instead, the debtor focuses on Bankruptcy Rule 1009, arguing that the rule permits him to amend his exemptions at any time, and that the 30 day limit under Bankruptcy Rule 4003(b)(1) for a trustee to object to an exemption is not a time limit on the debtor's ability to amend. The debtor continues that amendments are barred only where the debtor has acted in bad faith or legal prejudice will result. Because the trustee has not raised bad faith or prejudice, the debtor asserts that he is free to amend his schedules to claim a different asset as exempt under Ohio Revised Code § 2329.66(A)(18).

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<sup>12</sup> The parties' briefs are found at docket 19, 25, 28, 29, 31, and 32. These include supplemental briefs addressing the effect of *Schwab v. Reilly*, 130 S. Ct. 2652 (U.S. 2010) which was decided June 17, 2010.

## DISCUSSION

### **I.**

The filing of a bankruptcy case creates an estate that consists of all of the debtor's legal and equitable interests in property. 11 U.S.C. § 541(a)(1). The debtor may exempt, or remove, certain property from the estate so that he has the ability to make a fresh economic start. *See* 11 U.S.C. § 522. Ohio has opted out of the federal exemptions, which means that debtors who file for bankruptcy in Ohio must use the Ohio exemptions. *See* 11 U.S.C. § 522(b)(2) (permitting states to opt-out of the federal bankruptcy exemptions); and OHIO REV. CODE § 2329.662 (in which Ohio opts-out). Ohio Revised Code § 2329.66 (A)(18) is the wild card exemption that permits a debtor to claim as exempt an interest in any property in an amount up to \$1,075.00. The parties agree, as a general matter, that the wild card exemption may be applied to a debtor's interest in a tax refund.

Property claimed as exempt is exempt unless a party in interest objects. 11 U.S.C. § 522(1). A party in interest may object within 30 days after the meeting of creditors is concluded or within 30 days after any amendment is filed, whichever is later. FED. R. BANKR. P. 4003(b)(1). The trustee, as the objecting party, has the burden of proving that the exemption should not be allowed. FED. R. BANKR. P. 4003(c); *Hamo v. Wilson (In re Hamo)*, 233 B.R.718, 723 (B.A.P. 6th Cir. 1999).

The Federal Rules of Bankruptcy Procedure provide that a debtor may amend certain of his filings, including his schedule of exemptions, "as a matter of course at any time before the case is closed." FED. R. BANKR. P. 1009(a). The right is not, however, unlimited. Courts may refuse to permit a debtor to amend exemptions where the debtor has acted in bad faith or has concealed property, *Lucius v. McLemore*, 741 F.2d 125, 127 (6th Cir. 1984), or if the amendment

would cause prejudice to the creditors other than what would have existed if the exemption had been claimed originally, *see Doan v. Hudgins (In re Doan)*, 672 F.2d 831, 833 (11th Cir. 1982).

## II.

The pivotal question is this: What is the effect of the passage of time on the debtor's original use of the wild card exemption to remove his interest in the employer lawsuit from the estate? When 30 days elapsed after the meeting of creditors, did title to that interest revert in the debtor, such that the debtor may not return it to the estate and claim a different exemption, as the trustee contends? Or, as the debtor argues, may he change his mind at any time before the case is closed, and pick a different interest to exempt?

The Sixth Circuit long ago adopted the permissive approach to amendments, holding in *Lucius v. McLemore* that a debtor may amend his schedules under Rule 1009 at any time before the case is closed, so long as the debtor did not act in bad faith or conceal property. *McLemore*, 741 F.2d at 127. The Circuit found that there is no inconsistency between this rule and § 522 because amending a schedule to claim an exemption under the rule does not guarantee that the debtor will be permitted to exempt the property under the Code. *Id.*; *see also Andermahr v. Barrus (In re Andermahr)*, 30 B.R. 532, 534 (B.A.P. 9th Cir. 1983) ("The right to amend is not the same as the right to the exemption."); *In re Ruiz*, 406 B.R. 897, 901 (Bankr. E.D. Cal. 2009) ("The debtor's right to amend his . . . exemption schedule does not mean that the debtor has an absolute right to have the amended exemption allowed."). Instead, after the amendment is filed, a party in interest has 30 days in which to object to it. FED. R. BANKR. P. 4003(b)(1); *see also McLemore*, 741 F.2d at 127. Thus, if the debtor files an amendment seeking an exemption to which he is not entitled, the trustee may object on that basis.

The trustee does not argue here that the debtor is not entitled to a wild card exemption or that the tax refund is not an appropriate subject for that exemption or that the debtor has claimed as exempt an interest that is greater than the monetary limit set by that exemption. Nor does he argue bad faith or concealment or that the creditors will suffer legal prejudice if the amendment stands. If the debtor had claimed the tax refund as exempt under the wild card exemption in his original schedules, it seems that the trustee would not have objected to it. Under these circumstances, the passage of time does not give the trustee any greater rights to object.

The trustee relies primarily on *In re Erickson*, 406 B.R. 522 (Bankr. W.D. Mich. 2009) to support the theory that, absent objection, an asset is removed from the estate 30 days after the exemption is claimed and that an asset once removed cannot be returned. That decision is not persuasive here for multiple reasons. First, *Erickson* is based on the bankruptcy court's conclusion that the exempted real property had been exempted in kind; this conclusion is clearly at odds with the later-decided *Schwab v. Reilly*, 130 S. Ct. 2652 (U.S. 2010). *Id.* at 2662 n.9 (“[W]here, as here, a debtor claims an exemption pursuant to provisions that (like § 522(d)(6)) permit the debtor to exclude from the estate only an ‘interest’ in property, the ‘property’ that becomes exempt absent objection, § 522(l), is only the ‘partial interest’ claimed as exempt and not ‘the asset as a whole[.]’”). Second, the decision negates the proper role of Rule 1009, which is liberal in permitting a debtor to amend exemptions. On this point, the decision is also at odds with the *McLemore* holding that Rule 1009 is consistent with § 522(l) and “allow[s] amendment at any time before the case is closed and den[ies] courts discretion to reject amendments[.]” 741 F.2d at 127.

Section 522(l) is the statutory basis for the trustee's argument that the debtor's initial claim of exemption as to the lawsuit permanently removed that property from the estate, thereby

“irretrievably us[ing] that exemption to remove the claim against his employer from the estate.”<sup>13</sup>

However, § 522(l) does not establish the time limits for claiming and objecting to exemptions.

Instead, it defers to the bankruptcy rules on that issue. *Rogers v. Laurain (In re Laurain)*, 113

F.3d 595, 597 (6th Cir. 1997). Consequently, the § 522(l) proviso that “[u]nless a party in

interest objects, the property claimed as exempt . . . is exempt” is implemented by the

Bankruptcy Rules. Those rules permit a debtor to file an amended schedule of exemptions and

they set the time for objecting to the amendment. FED. R. BANK. P. 1009 and 4003(b)(1).

Therefore, when a debtor files an amended schedule of exemptions, it reopens the issue of what

property is claimed as exempt and a new period to object begins as to the amendment; § 522(l)

must be interpreted to accommodate that process.

There is ample case authority acknowledging a debtor’s right to amend his schedule of exemptions to delete one exemption to accommodate an exemption of different property. *See for example, In re Akulova*, 407 B.R. 602, 604-6 (Bankr. D. Del. 2009) (acknowledging that Rule 1009 permits a debtor to remove one exemption to accommodate another, but determining that the amendment being considered was not allowed due to debtor’s bad faith); *In re Asbury*, 263 B.R. 839, 840-41 (Bankr. S.D. Ohio 2001) (overruling trustee’s objection to amendment deleting wild card exemption as to checking account balance and automobile and applying that exemption to a tax refund); *In re Sacco*, 99 B.R. 647, 649-50 (Bankr. W.D. Pa. 1989) (overruling trustee’s objection to amendment deleting real property exemption and adding exemption of proceeds of a personal injury action instead); *see also In re Iwasko*, No. 05-83036, 2006 WL 2855040, at \*2 (Bankr. E.D. Mich. Oct. 4, 2006) (“Therefore, a debtor who discovers that one exemption

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<sup>13</sup> Docket 22 at 3.

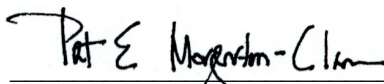
scheme is more favorable than another scheme, should be allowed to amend his exemptions at any time during the case, absent bad faith or concealment of assets.”); *In re Printup*, 264 B.R. 169, 175 (Bankr. E.D. Tenn. 2001) (noting that the debtor’s amended schedule of exemptions did not alter the debtor’s claim of exemption as to clothing and household items and therefore, that the items ceased to be property of the estate and were not brought back into the estate by the amendment).

Under the facts of this case, Bankruptcy Rule 1009 permitted the debtor to file an amended schedule of exemptions and to claim his tax refund as exempt under the wild card provision. This result permits the debtor to have the assets to which he is entitled under the Bankruptcy Code, while at the same time it puts the creditors in the same position they would have been in had the debtor claimed the tax refunds as exempt in his initial filing.

### **CONCLUSION**

For the reasons stated, the trustee’s motion to turn over tax refunds as property of the estate is granted only as to the undisputed amount of \$1,001.31 and is denied as to the balance of the refunds. The trustee’s objection to the debtor’s amended exemption claim is overruled.

A separate order will be entered reflecting this decision.

  
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Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION



In re:

MICHAEL J. CASELLA, JR.,

Debtor.

) Case No. 09-18457

)

) Chapter 7

)

) Judge Pat E. Morgenstern-Clarren

)

) **ORDER**

For the reasons stated in the memorandum of opinion entered this same date, the chapter 7 trustee's motion to turn over tax refunds as property of the estate is granted only as to the undisputed amount of \$1,001.31 and is denied as to the balance of the refunds. (Docket 16). The trustee's objection to the debtor's amended exemption claim is overruled. (Docket 22).

IT IS SO ORDERED.

Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge