UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 10-17252
GEORGE C. DAHER,	)	Chapter 7
Debtor.	)	Chief Judge Pat E. Morgenstern-Clarren
WALDEMAR J. WOJCIK, TRUSTEE	)	Adversary Proceeding No. 13-1232
Plaintiff,	)	
v.	)	
JOHN W. GOLD, *et al.*,	)	**MEMORANDUM OF OPINION**[1]
Defendants.	)	

The plaintiff-chapter 7 trustee seeks to recover, as property of the bankruptcy estate, insurance proceeds obtained by the debtor from the State of Ohio's Division of Unclaimed Funds. The defendants, the debtor George Daher and his attorney John Gold, assert the funds are not estate property. For the reasons stated below, the court concludes that the funds are estate property and the trustee is entitled to judgment on the complaint.

I. JURISDICTION

Jurisdiction over this proceeding exists under 28 U.S.C. § 1334 and General Order No. 2012-7 entered by the United States District Court for the Northern District of Ohio on April 4, 2012. This is a core proceeding under 28 U.S.C. § 157(b)(2)(E) and (O), and it is within the court's constitutional authority as analyzed by the United States Supreme Court in *Stern v. Marshall*, 131 S.Ct. 2594 (2011).

[1] This opinion is not intended for publication, either in print or electronically.

II. FACTS

A. Stipulated Facts

The parties submitted this dispute for decision on these stipulated facts:[2]

1. George C. Daher ("Daher" [or debtor]) became the owner of the property located at 20602 Clare Ave., Maple Hts., Ohio (the "Property") on August 16, 2004.

2. He executed a Note and Mortgage on the Property in September 2004.

3. Community First Bank was the lender and holder of two notes and mortgages, in the amount of $90,000.00 and $25,000.00 respectively.

4. There is no record that either security interest was ever assigned to Aurora [Loan Services], [or] Wells Fargo, N.A. dba America's Servicing Company.

5. On April 6, 2006, Aurora Loan Services ("Aurora"), as purported holder of the note and first mortgage, filed a foreclosure suit against Daher relative to the Property. The foreclosure suit is Cuyahoga County Common Pleas Court Case No. CV-06-588641. The named defendants are George Daher, Jane Doe, unknown spouse of George Daher, and Mortgage Electronic Registration Systems, Inc. Aurora failed to name Wells Fargo, N.A., dba America's Servicing Company as a defendant to the foreclosure action even though [it] purportedly held the second mortgage on the property. No answers were filed.

6. Real Time Resolution's, Inc. is the purported assignee of the debt associated with the second mortgage.

7. On January 10, 2007[,] judgment was entered in favor of Aurora in the amount of $88,858.44 in the foreclosure suit.

8. On or about March of 2007, Daher discovered damage to the Property. He submitted a claim to Farmers Insurance Company in the amount of $51,022.37 for losses to both real and personal property.

9. In March 2007[,] the insurance check was issued. The check was payable to three parties: Daher, Aurora and Wells Fargo, N.A. dba America's Servicing Company.

10. Daher claims to have performed the repairs on or about March of 2007.

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[2] *See* docket 12, 15.

11. In March 2007[,] Daher signed the back of the check and sent it to Aurora via regular U.S. mail per Aurora's instructions.

12. On or about April 23, 2007[,] the Property was sold at Sheriff's sale to Aurora, [which] purportedly was the first lienholder on the property.

13. On or about May 17, 2007[,] the Sheriff's sale was confirmed.

14. [On] August 31, 2007[,] Daher filed a chapter 13 bankruptcy case, pro se: Case No. 07-16610-pmc. Daher did not file any schedules. Daher filed a motion to voluntarily dismiss the case on September 24, 2007. One claim was filed relative to the Property. The creditor identified itself as "Aurora Loan/ASC c/o Real Time Resolutions, Inc." and filed an unsecured claim in the amount of $29,961.89.

15. On July 24, 2010, this chapter 7 bankruptcy case was filed. Daher did not make any disclosure regarding the insurance claim from 2007.

16. When Daher filed this case, he did not have possession of the insurance check and did not know that the check had not been cashed.

17. The insurance check was not cashed by Daher, Aurora or anyone else.

18. In March 2012[,] Daher first became aware that the funds were being held by the Ohio Div. of Unclaimed Funds.

19. The State of Ohio's Division of Unclaimed Funds would not release the funds to Daher unless Aurora and another entity known then as ASC relinquished claims to the funds as payees.

20. On July 6, 2012, Daher filed a lawsuit against Aurora, etc., [sic] captioned Daher v. Aurora Loan Services LLC, Wells Fargo Bank, N.A. dba America's Servicing Company and Real Time Resolutions, Inc.

21. The counts in that lawsuit are for declaratory judgment that Daher has the sole claim to the funds, for breach of contract and for violation of the Fair Debt Collection Practices Act.

22. On August 8, 2013, Judge McMonagle ruled in favor of Daher on his motion for summary judgment on Count I and issued a declaratory judgment entitling Daher to make full claim to the $51,022.37 held by the State of Ohio.

B. The Stipulated Facts, Restated

These are the stipulated facts that are directly relevant to the dispute:

The debtor maintained an insurance policy with Farmers Insurance Company on property he owned on Clare Avenue in Maple Heights, Ohio.[3] The debtor is the named insured, with "Aurora Loan Services" and "America's Servicing" named as "mortgagees or other interests." The policy states that: "If a mortgagee is named in this policy, a covered loss will be paid to the mortgagee and the [insured], as interests appear."[4]

In 2007, the debtor submitted a claim to Farmers for damage to his Clare Avenue real and personal property. In March 2007, Farmers settled the claim by issuing a check made payable to the debtor, Aurora Loan Services, and Wells Fargo, N.A. dba America's Servicing Company (Wells Fargo). Daher, following Aurora's instructions, indorsed the check and sent it to Aurora. No one ever cashed the check. In April 2007, the Property was sold to Aurora at a sheriff's sale.[5]

The debtor filed this chapter 7 on July 24, 2010. He did not disclose the insurance claim, did not have possession of the check, and did not know that the check had not been cashed. The debtor received his discharge and the case was closed as a "no asset" case.

In March 2012, the debtor learned that the insurance proceeds were being held by the State of Ohio, Division of Unclaimed Funds. He filed a state court lawsuit against Aurora, Wells

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[3] The parties did not include the insurance policy in the stipulations, but the defendants filed it without objection as an exhibit to their trial brief.

[4] Insurance Policy at Section I, Conditions at 16, docket 17 at exh. 1.

[5] The debtor filed a chapter 13 case on August 31, 2007, which he dismissed on September 24, 2007 without filing a plan, schedules or any of the other required documents. The parties have not suggested that the loan proceeds were an asset of the chapter 13 estate.

Fargo, and Real Time Resolutions asking, in Count 1, for a declaratory judgment that he had the sole claim to the funds. On motion of the chapter 7 trustee, this court reopened the chapter 7 case to permit the trustee to administer any funds recovered that were property of the estate. The state court granted a summary judgment to the debtor on Count 1 and issued a declaratory judgment entitling the debtor to make full claim to the $51,022.37 held by Ohio. No one appealed from the judgment. The debtor obtained the funds and gave them to attorney Gold, who holds them in his IOLTA account by agreement of the parties.[6]

III. ISSUE

Are the insurance proceeds property of the chapter 7 estate?

IV. THE APPLICABLE LAW

Under Bankruptcy Code § 541, "property of the estate is broadly defined to include 'all legal and equitable interests of the debtor in property as of the commencement of the case,' and '[a]ny interest in property that the estate acquires after the commencement of the case.'" *Borock v. Mathis (In re Clipper Int'l Corp.)*, 154 F.3d 565, 567 (6th Cir. 1998). "Thus, '[m]oney whose origin is part of the pre-petition period belongs to the estate pursuant to § 541.'" *Id.* (quoting *Hartley v. Derryberry (In re Hartley)*, 47 B.R. 159, 161 (Bankr. N.D. Ohio 1985)). However, property of the estate does not include "[a]ny power that the debtor may exercise solely for the benefit of an entity other than the debtor[.]" 11 U.S.C. § 541(b)(1). The general principal is that "if the power in question may be exercised for the benefit of another entity, but is capable of conferring power on the debtor **also**, it becomes property of the estate." 5 COLLIER ON BANKRUPTCY § 541.17 (Alan N. Resnick & Henry J. Sommer eds., 16th ed) (emphasis added).

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[6] *See* Agreed Order, Case No. 10-17252, docket 44.

"'Property' is construed 'generously' under the Bankruptcy Code." *Tyler v. DH Capital Mgmt., Inc.*, 736 F.3d 455, 461 (6th Cir. 2013) (quoting *Segal v. Rochelle*, 382 U.S. 375, 379 (1966)). Every conceivable interest that a debtor has, whether future, nonpossessory, contingent, speculative or derivative "'is within the reach of § 541.'" *Id*. (quoting *Azbill v. Kendrick (in re Azbill)*, 385 B.R. 799 at *7 (table) (6th Cir. B.A.P. 2008)); *see also Johnston v. Hazlett (In re Johnston)*, 209 F.3d 611, 613 (6th Cir. 2000) (stating that § 541 is intended to be given a broad definition). "The nature and extent of property rights in bankruptcy are determined by the 'underlying substantive law.'" *Tyler*, 736 F.3d at 461 (quoting *Raleigh v. Ill. Dep't of Rev.*, 530 U.S. 15, 20 (2000)). In this case, the parties agree that Ohio law determines the nature and extent of the debtor's property rights in the insurance proceeds.[7] "But 'once that determination is made, federal bankruptcy law dictates to what extent that interest is property of the estate for the purposes of § 541.'" *Id*. (quoting *Bavely v. United States (In re Terwilliger's Catering Plus, Inc.)*, 911 F.2d 1168, 1172 (6th Cir. 1990)).

V. <u>THE POSITIONS OF THE PARTIES</u>

The trustee argues that the insurance proceeds are estate property because the debtor's interest in them arises from the pre-bankruptcy events. The defendants' position is that the funds are not property of the estate because: (1) the funds are excluded from the estate under

[7] Both federal common law and Ohio law look to the Restatement of Conflicts of Law as to choice of law determinations. *See DaimlerChrysler Corp. Healthcare Benefits Plan v. Durden*, 448 F.3d 918, 922 (6th Cir. 2006) (applying the Restatement) and *EnQuip Technologies Grp., Inc. v. Tycon Technoglass S.R.I.*, 986 N.E.2d 469, 483 (Ohio Ct. App. 2012) (adopting the Restatement as Ohio's choice of law rules). Under Restatement § 193, rights created under an insurance contract are generally determined by the local law of the state which the parties understood to be the location of the insured risk during the term of the policy. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 193. As the insured property is located in Ohio, its law governs.

Bankruptcy Code § 541(b)(1); and (2) the debtor's interest is not sufficiently rooted in the pre-bankruptcy period to permit the funds to be included in the bankruptcy estate.

VI. DISCUSSION

The state court determined that the debtor is entitled to claim the insurance proceeds from the state, which the debtor has done. The issue remaining is whether the debtor may keep the money for himself or must instead turn it over to the chapter 7 trustee as property of the estate to be distributed to the debtor's creditors. That in turn depends on what interest the debtor had in the insurance proceeds and when any such interest arose.

A. The Debtor's Interest in the Insurance Proceeds

Under Ohio law, the property owner and any entity holding a mortgage on the property have separate insurable interests in the property. *McDonald v. Admin. of Wm. Black*, 20 Ohio 185 (syllabus at ¶ 1) (Ohio 1851); *Gabel v. Richley*, 655 N.E.2d 773, 780 (Ohio Ct. App. 1995). Consistent with that, the insurance policy at issue here named the debtor as the insured and Aurora Loan Services and America's Servicing as additional mortgagees or holders of other interests.[8] Because they were all named in the policy, all of them had rights with respect to the insurance proceeds. *See generally,* 59 Ohio Jur. 3d, Insurance § 1241-1246 (2014). As a result, after the Property suffered damage and Farmers issued the check, the debtor had vested rights in the insurance proceeds. *See Fed. Dep. Ins. Corp. v. Willoughby*, 482 N.E.2d 1267, 1271 (Ohio Ct. App. 1984) (describing a mortgagor's interest in insurance proceeds as an equitable interest in property); *Arlington Bank v. United Ohio Ins. Co.*, No. CT11-0024, 2011 WL 5626348 at * 4 (Ohio Ct. App. Nov. 16, 2011) (noting that the insured mortgagor and mortgagee named as

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[8] The defendants argue that Aurora was named as mortgagee of the Property; however, the interest of America's Servicing in the matter has not been identified. Ultimately, the interests of the named loss payees is not relevant to this decision.

payees under an insurance policy each "had the same right to recovery under the policy"); *State, ex rel. Squire v. Royal Ins. Co.*, 16 N.E. 2d 342, 344 (Ohio Ct. App. 1938) (noting that even where a mortgagee has a superior right to the proceeds of an insurance policy, it holds any amount exceeding the mortgage debt for the benefit of the property owner). The insurance check, payable jointly to the debtor and the additional loss payees, reflected the debtor's interest in the proceeds.

The defendants raise two arguments in support of their position that the debtor did not have any interest in the proceeds by the time he filed his bankruptcy case in 2010.

B. Bankruptcy Code § 541(b)(1)

First, the defendants contend that the funds are excluded from the estate under Bankruptcy Code § 541(b)(1), which–as noted above–excludes any power that the debtor may exercise solely for the benefit of another. The defendants argue that the only power that the debtor had was to sign the funds over for the benefit of Aurora as mortgagee. Consequently, when he did so, he acted solely for Aurora's benefit. And so the proceeds are outside of the bankruptcy estate.

They rely for support only on *In re Ivory*, 32 B.R. 788 (Bankr. D. Or. 1983), a case that is not relevant because it interprets Oregon property law in the context of a chapter 13 provision. Nevertheless, the court will examine the merits of the § 541(b)(1) argument. For this argument to succeed, the relevant facts must be limited to those that existed in 2007 when the insured loss occurred. Ohio law does not, however, support that assumption. Instead, case law establishes that a mortgagee's rights can change over time.

In *Barwick v. State Farm Fire & Cas. Ins. Co.*, No. 24625, 2011 WL 5317305 (Ohio Ct. App. Nov. 4, 2011), the Ohio state court considered facts which are substantially similar to those

presented in this case. The court's reasoning exposes the flaw in the defendants' argument. In *Barwick*, after a fire damaged insured property, the insurance company issued a check payable to the property owners and the mortgagee. No one cashed the check and the sheriff sold the property in a foreclosure sale. At that point, the property owners filed a complaint against the insurance company and the mortgagee claiming the insurance proceeds should go to them. The court concluded that the mortgagee's rights to the insurance proceeds accrued at the time of loss, but were later extinguished to the extent the mortgagee had received satisfaction of its debt through the foreclosure sale. In other words, the relevant facts were not limited to those that existed at the time of the loss.[9]

Applying the Ohio property law discussion and *Barwick* reasoning to this case, the analysis of the debtor's interest in the proceeds must continue beyond the date of the loss to the time of the bankruptcy filing. In other words, the question is *not*: did the debtor have a power in 2007 that could only be used for the benefit of Aurora?[10] The question instead is this: when the debtor filed his case in 2010, did he have a power that could be exercised only for the benefit of Aurora? Starting with 2007, the debtor had a vested interest in the insurance proceeds. Moving to 2010, he still had a vested interest in those proceeds because nothing had happened to divest him of that interest. Indeed, if he did not have a vested interest at that point the state court would not have had a basis for entering judgment in his favor. True, the additional loss payees may

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[9] The *Barwick* opinion relied heavily on case law discussing Tennessee law in reaching its conclusion: *Lee v. Royal Indem. Co.*, 108 F.3d 651 (6th Cir. 1997) and *Benton Banking Co. v. Tennessee Farmers Mut. Ins. Co.*, 906 S.W.2d 436 (Tenn. 1995). Both decisions support the proposition that while a mortgagee's rights to insurance proceeds are determined at the time of loss, those rights can change based on the actions of the mortgagee following the loss. *See also* RESTATEMENT (THIRD) PROPERTY: MORTGAGES § 4.8 (1997).

[10] The court is not making a finding on this point, just stating the issue.

also have had a claim to the proceeds at that point, but the state court judgment resolves that in the debtor's favor. What the stipulated facts show is that at the time of the 2010 filing, the debtor did not have any power with respect to the funds that could be exercised only for Aurora's benefit because he had indorsed the check many years before and no longer had it in his possession. The funds, therefore, are not excluded from the estate under § 541(b)(1).

C. The Debtor's Knowledge About and Access to the Funds When He Filed His Chapter 7 Case

The defendants next argue that the debtor did not have an interest in the funds at filing because he did not know that the State held the funds and he did not have the power to demand their disbursement until he obtained the judgment, post-filing. This argument fails for two reasons.

First, the argument mis-characterizes the nature of unclaimed funds, which remain the property of the original owner under Ohio's Unclaimed Funds Act. *Sogg v. Zurz*, 905 N.E.2d 187, 191 (Ohio 2009). Therefore, the judgment did not create the debtor's interest in the insurance proceeds. Instead, the debtor's interest in the insurance proceeds necessarily preceded and provided the basis for the state court judgment.

Second, the argument does not recognize the broad definition of property. The definition includes all legal and equitable interests of the debtor in property at the commencement of the case, as well as any interest in property that the estate acquires after the case is filed. The debtor's rights with respect to the insurance proceeds originated prepetition under the terms of the insurance policy, regardless of the fact that the debtor did not know he had a right to claim the funds until after filing his chapter 7 case. The debtor's rights to the funds became property of the estate when he filed his case in 2010. *See Demczyk v. Mut. Life Ins. Co. of N.Y. (In re*

Graham Square, Inc.), 126 F.3d 823, 831 (6th Cir.1997) (stating that "property of the estate includes the debtor's interest in a cause of action" and also "allows the bankruptcy trustee to regain possession of property in which the debtor has equitable as well as legal title"). Because the debtor's rights with respect to the funds were property of the bankruptcy estate, the estate acquired the sole right to the funds under the state court judgment. The trustee is now entitled to turnover of the funds under Bankruptcy Code § 542(a). *See* 11 U.S.C. § 542(a)(1) (providing for turnover of property that the trustee may use unless it is of inconsequential value or benefit to the estate).

VII. CONCLUSION

For the reasons stated, the $51,022.37 in insurance proceeds are determined to be property of the chapter 7 estate and subject to turnover. A separate judgment will be entered in favor of the plaintiff-trustee to reflect this decision.

Pat E. Morgenstern-Clarren
Chief Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
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GEORGE C. DAHER,	)	Chapter 7
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Debtor.	)	Chief Judge Pat E. Morgenstern-Clarren
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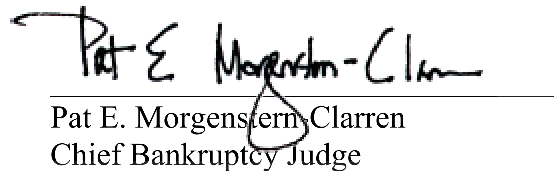
WALDEMAR J. WOJCIK, TRUSTEE	)	Adversary Proceeding No. 13-1232
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
JOHN W. GOLD, *et al.*,	)	**JUDGMENT**
	)	
Defendants.	)	
	)	

For the reasons stated in the memorandum of opinion entered this same date, the plaintiff is granted judgment against the defendants. The $51,022.37 in insurance proceeds are determined to be property of the estate, and those funds are to be turned over to the plaintiff.

IT IS SO ORDERED.



Pat E. Morgenstern-Clarren
Chief Bankruptcy Judge