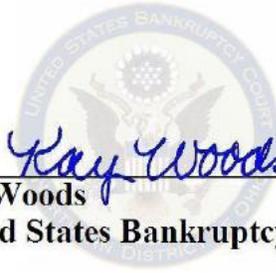


IT IS SO ORDERED.

Dated: October 14, 2016
02:57:17 PM



Kay Woods

 Kay Woods
 United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

NICHOLAS J. WIERY and
KAREN WIERY,

Debtors.

*
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* CASE NUMBER 05-46229

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* CHAPTER 7

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* HONORABLE KAY WOODS
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MEMORANDUM OPINION REGARDING PROPERTY OF THE BANKRUPTCY ESTATE

On September 27, 2005 ("Petition Date"), Debtors Nicholas J. Wiery ("Nicholas") and Karen Wiery (collectively, "Debtors"), by and through counsel Ralph A. Zuzolo, Esq., filed a voluntary petition pursuant to chapter 7 of the Bankruptcy Code. Michael D. Buzulencia ("Trustee") was appointed chapter 7 trustee. The Debtors received a discharge on December 28, 2005 (Doc. 15). This case was closed on January 3, 2006 (Doc. 17).

On June 2, 2016, the Trustee filed Motion to Reopen Case (Doc. 18). The Court held a hearing on the Motion to Reopen Case

on June 23, 2016, at which the Trustee appeared. The Trustee stated he had been informed that Nicholas had received an offer of money relating to personal injury suffered by Nicholas when he was a minor child ("Personal Injury"). The Court granted the Motion to Reopen Case and entered Order to Reopen Case (Doc. 21) on that same date.¹

Thereafter, the Trustee filed Request for Notice to Creditors (Doc. 25) on July 5, 2016. On July 6, 2016, Notice of Need to File Proof of Claim Due to Recovery of Assets ("Claim Notice") (Doc. 26) was sent to all creditors and parties in interest in this case. The Claim Notice set October 13, 2016 as the last date to file claims in this case. To date, no timely claims have been filed in this case.²

Because the Court had questions concerning whether (i) the Personal Injury cause of action constituted property of the bankruptcy estate under 11 U.S.C. § 541; and (ii) reopening this case would cause Nicholas further injury, on August 30, 2016, the Court entered Order Requiring Briefs Under Seal ("Order")

¹ "The reopening of a case is a ministerial act, which 'lacks independent legal significance and determines nothing with respect to the merits of the case.'" *In re Oglesby*, 519 B.R. 699, 703 (Bankr. N.D. Ohio 2014) (quoting *Cusano v. Klein*, 264 F.3d 936, 948 (9th Cir. 2001)).

² The Trustee filed Trustee's Report of No Distribution (Doc. 14) on December 8, 2005. Because this case was originally deemed to be a "no asset" case, no creditor filed a proof of claim before the case was closed on January 3, 2006. Likewise, no creditor has filed a proof of claim in response to the Claim Notice. As a consequence, there is no party for whose benefit any estate property could be administered.

(Doc. 31). The Court asked for information regarding the nature of the Personal Injury, when the Personal Injury occurred, the relevant statute of limitations, and whether there were any public policy issues to be considered given the nature of the Personal Injury.³ In compliance with the Order, the Trustee and the Debtors filed briefs under seal, as follows: (i) on September 16, 2016, the Trustee filed Trustee's Brief in Response to the Court Order Requiring Briefs Under Seal (Doc. 33); (ii) on September 30, 2016, the Debtors filed Debtors' Brief in Response to Trustee's Brief in Response to Court's Order (Doc. 34); and (iii) on October 7, 2016, the Trustee filed Trustee's Brief in Response to Debtor's [sic] Response to Trustee's Brief Filed Under Seal (Doc. 35).

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and General Order No. 2012-7 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 Federal Rule of Bankruptcy Procedure 7052.

³ The Debtors and the Trustee have differing positions concerning public policy considerations regarding the Personal Injury. Having concluded that the Personal Injury cause of action is not property of the estate, the Court will not address any public policy considerations. "We need not decide whether emotional distress might in some circumstances be so personal to the debtor that it would be undesirable, on public policy grounds, to transfer the property interest to the bankruptcy trustee." *Sierra Switchboard Co. v. Westinghouse Electric Corp.*, 789 F.2d 705, 709 n.3 (9th Cir. 1986).

I. ARGUMENTS OF THE PARTIES

The briefs submitted by the Trustee and the Debtors establish the following undisputed facts:

1. Nicholas suffered the Personal Injury from approximately 1986 to 1989 when he was a minor child.
2. The applicable statute of limitations in Ohio governing the Personal Injury cause of action ("Statute of Limitations") provided that a cause of action for the kind of personal injury suffered by Nicholas had to be filed no later than one year after Nicholas reached the age of majority (age 18).
3. The Statute of Limitations expired on February 19, 1990 when Nicholas turned 19 years of age.
4. Nicholas was barred from filing a lawsuit relating to the Personal Injury after February 19, 1990.
5. Nicholas never filed a lawsuit relating to the Personal Injury and no lawsuit was ever filed on behalf of Nicholas relating to the Personal Injury.
6. In 2006, the Statute of Limitations was amended to provide a 12-year period after reaching the age of majority to file a lawsuit based on the kind of personal injury suffered by Nicholas.
7. At the time the Statute of Limitations was amended in 2006, Nicholas was 35 years of age; thus, the amendment to the

Statute of Limitations did not extend the time in which Nicholas could file a lawsuit relating to the Personal Injury.

8. When the Debtors filed this bankruptcy case on September 27, 2005, Nicholas could not assert a cause of action for the Personal Injury because the Statute of Limitations had expired on February 19, 1990.
9. Nicholas may suffer ongoing and continuing emotional distress as a result of the Personal Injury.

II. LEGAL ANALYSIS

11 U.S.C. § 704(a)(1) provides, "(a) The trustee shall— (1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest[.]"

11 U.S.C. § 704(a)(1) (2016). Property of the bankruptcy estate is defined in 11 U.S.C. § 541:

(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

11 U.S.C. § 541(a)(1), (6) (2016).

The Trustee's duties are limited to administering property of the bankruptcy estate. The Trustee argues that, because the conduct that caused the Personal Injury to Nicholas occurred prior to the Petition Date, any money relating to the Personal Injury constitutes property of the estate. However, in order for any money relating to the Personal Injury cause of action to be property of the estate, the Personal Injury cause of action has to be property of the bankruptcy estate. Thus, the question before the Court is whether the Personal Injury cause of action constitutes property of the bankruptcy estate. For the following reasons, the Court finds that the Personal Injury cause of action is not property of the bankruptcy estate.

Whether a cause of action constitutes property of the bankruptcy estate depends on whether the debtor had an enforceable legal or equitable interest in such cause of action as of the commencement of the bankruptcy case.

Under § 541(a) of the Bankruptcy Code, the commencement of a bankruptcy case results in the creation of a bankruptcy estate that includes all legal or equitable property interests of the debtor, except as provided in subsections (b) and (c)(2). The estate created pursuant to § 541 includes causes of action belonging to the debtor at the time the case is commenced, including causes of action or claims for personal or bodily injury.

In re Hamlett, 304 B.R. 737, 740 (Bankr. M.D.N.C. 2003) (emphasis added); see also *Holbrook v. Country Mut. Ins. Co. (In re Burnett)*, 447 B.R. 634, 642 (Bankr. W.D. Okla. 2011) (citations and

parentheticals omitted) (emphasis added) ("A debtor's bankruptcy estate includes all causes of action of the debtor, including without limitation, all claims for personal injury, which could have been brought on the petition date.").

To determine whether Nicholas had a legal or equitable interest in the Personal Injury cause of action as of the Petition Date, this Court first examines the definition of cause of action. A cause of action is "[a] group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person[.]" BLACK'S LAW DICTIONARY 266 (10th ed. 2014). A debtor may, however, be barred from asserting a cause of action by a statute of limitations, which is defined as "[a] law that bars claims after a specified period; specif., a statute establishing a time limit for suing in a civil case, based on the date when the claim accrued (as when the injury occurred or was discovered)[.]" *Id.* at 1636.

In *Tyler v. DH Capital Mgmt., Inc.*, 736 F.3d 455 (6th Cir. 2013), the Sixth Circuit Court of Appeals addressed whether a cause of action arose when a lawsuit against the debtor was filed (pre-petition) or when the debtor was served (post-petition). The lawsuit against the debtor allegedly violated the Fair Debt Collection Practices Act ("FDCPA") when it attempted to collect a pre-petition debt. The court first held that it was not sufficient that the debt upon which the alleged FDCPA violation was based was

pre-petition. "First, pre-petition conduct or facts alone will not 'root' a claim in the past; there must be a pre-petition violation." *Id.* at 462 (citations and parentheticals omitted).

The court noted:

Determining the time at which a cause of action becomes bankruptcy property is not straightforward. The nature and extent of property rights in bankruptcy are determined by the "underlying substantive law." *Raleigh v. Ill. Dep't of Rev.*, 530 U.S. 15, 20, 120 S. Ct. 1951, 147 L. Ed. 2d 13 (2000). 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. *Bavely v. United States (In re Terwilliger's Catering Plus, Inc.)*, 911 F.2d 1168, 1172 (6th Cir. 1990).

Id. at 461 (n.4 omitted) (emphasis added). The court held that the debtor had a pre-petition right to assert a cause of action when the lawsuit was filed; thus, the cause of action constituted property of the bankruptcy estate.

As set forth by the Sixth Circuit, "the nature and extent of property rights in bankruptcy are determined by the underlying substantive law" – in this case the laws of Ohio govern the cause of action for the Personal Injury. There is no dispute that the applicable Ohio Statute of Limitations barred Nicholas from filing a lawsuit for the Personal Injury after February 19, 1990 – more than 15 years prior to the Petition Date. It is not enough that the conduct that inflicted and caused the Personal Injury occurred prior to the Petition Date. As of the Petition Date, because Nicholas could not pursue a claim for damages based on the Personal

Injury, he did not possess a legal or equitable interest in the Personal Injury cause of action. Thus, the Personal Injury cause of action did not and cannot constitute property of the estate under § 541. This Court concludes that, as of the Petition Date, the Personal Injury cause of action was not property of the bankruptcy estate.

Furthermore, any money that presently may be payable to Nicholas relating to the Personal Injury is not and cannot be property of the estate because any such payment cannot constitute a settlement of or an award of damages for the Personal Injury cause of action. The reasoning of the bankruptcy court in *In re Vanwart*, 497 B.R. 207 (Bankr. M.D.N.C. 2013) is instructive on this point. In the *Vanwart* case, the bankruptcy court had to determine if a \$25,000.00 payment from the debtors' mortgage company, which the debtors received post-petition, was property of the bankruptcy estate. The mortgage company had filed and dismissed a foreclosure action against the debtors in 2009; the same mortgage company foreclosed on the debtors' residence and sold the property in 2011. The debtors filed their bankruptcy petition in 2013 and received the \$25,000.00 payment several months thereafter. There were two enforcement actions brought by the government against the mortgage company and consent decrees were reached in 2011 and 2013 that paid the debtors and others. However, there was no admission of liability by the mortgage

company or a requirement that receipt of payment ended any rights against the mortgage company. To determine if the payment constituted property of the estate, the court had to consider the basis for the payment. The court reasoned:

Here, the debtors' bankruptcy case commenced on January 25, 2013, when the debtors filed their voluntary chapter 7 petition. The \$25,000.00 was received postpetition on April 12, 2013. If the debtor held a legal or equitable interest in the property at the commencement of the case, the payment is property of the estate. . . . The court concludes that in this case, it is not.

Although the debtors' qualification to receive the payment is based upon the first foreclosure action, initiated on September 17, 2009 and dismissed on December 14, 2009, the payment was not sufficiently rooted in that action as to render the payment property of the estate. While a bankruptcy estate includes "causes of action" belonging to the debtor at the time the case is commenced, *In re Hamlett*, 304 B.R. 737, 740 (Bankr. M.D.N.C. 2003), that analysis is inapplicable here because there is no indication that the debtors were wrongfully foreclosed upon or have some other cause of action against SunTrust Mortgage. The 2013 consent order and the letter the debtors received with the payment explicitly state that the payment is in no way an admission of liability or wrongdoing on SunTrust Mortgage's behalf, nor does acceptance of the payment by the debtors foreclose their ability to bring a cause of action against SunTrust Mortgage. Furthermore, the foreclosure action which made the debtors eligible as part of the In-scope Borrower Population was voluntarily dismissed without prejudice. The actual completed foreclosure, initiated on June 23, 2011, did not occur within the dates targeted by the enforcement action: January 1, 2009 to December 31, 2010. Neither of the foreclosure actions have been alleged to have been deficient in any manner. Ultimately, the SunTrust entities, possibly for their own convenience, decided to forego the Independent Foreclosure Review that would have identified specific deficient foreclosure actions, and opted instead to make blanket payments to the entire

In-scope Borrower Population. Therefore, the \$25,000.00 payment was not related to a cause of action held by the debtors at the time of the commencement of the bankruptcy case.

Id. at 212 (emphasis added).

Similarly, in the present case, it appears that some entity is offering or may offer Nicholas a payment relating to the Personal Injury. Because Nicholas had no legally enforceable cause of action based on the Personal Injury as of the Petition Date and presently has no such rights, any present offer of payment cannot be in settlement of or an award for damages based on any Personal Injury cause of action. As of the Petition Date, there was no offer of payment from any entity relating to the Personal Injury and Nicholas did not and could not have had any legal or equitable interest in an offer of payment that did not exist at that time. As a consequence, any current offer of money to Nicholas relating to the Personal Injury is not property of the estate.

III. CONCLUSION

As set forth above, the Court finds that the Trustee has no right to administer any money that may be payable or paid to Nicholas relating to the Personal Injury because any such payment is not and cannot constitute property of the estate, as defined in 11 U.S.C. § 541.

An appropriate order will follow.

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IT IS SO ORDERED.

Dated: October 14, 2016
02:57:17 PM



Kay Woods

 Kay Woods
 United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

NICHOLAS J. WIERY and
KAREN WIERY,

Debtors.

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CASE NUMBER 05-46229

CHAPTER 7

HONORABLE KAY WOODS

ORDER (i) FINDING PERSONAL INJURY CAUSE OF ACTION AND
ANY MONEY RELATING TO THE PERSONAL INJURY
ARE NOT PROPERTY OF THE BANKRUPTCY ESTATE; AND
(ii) REQUIRING TRUSTEE TO FILE FINAL REPORT WITHIN 14 DAYS

For the reasons set forth in the Court's Memorandum Opinion
Regarding Property of the Bankruptcy Estate entered on this date,
the Court hereby finds:

1. The Personal Injury cause of action is not property of the
bankruptcy estate pursuant to 11 U.S.C. § 541; and

2. Any money payable to Nicholas relating to the Personal Injury is not property of the bankruptcy estate pursuant to 11 U.S.C. § 541.

The Trustee is hereby ordered to file a final report within fourteen (14) days after entry of this Order so the Debtors' case can be closed.

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