
In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:)
)
KYU O. SWARTZ) Chapter 7 Case
)
) Number 93-40666
)
Debtor)

**MEMORANDUM AND ORDER ON DEBTOR'S MOTION TO
APPROVE SETTLEMENT AND ALLOW ATTORNEY'S FEES**

This matter comes before the court on Debtor's Motion to Approve Settlement and Allow Attorney's Fees. A hearing to consider said motion was held on August 16, 1994, after which the court took the matter under advisement. Based upon the evidence adduced at the hearing, the record in the file and applicable authorities, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Debtor filed her petition for relief under Chapter 7 of the Bankruptcy Code on April 19, 1993. In Schedule "B" of the bankruptcy schedules filed with her petition, Debtor listed as personal property her "Loss of Earnings due to auto accident.-Unknown Amount." Debtor similarly listed this asset in Schedule "C" - Property Claimed As Exempt,

indicating that the amount of her interest, as well as the amount that she was claiming as exempt, was "Unknown". Trustee did not object to Debtor's claim of exemptions within the time permitted under Bankruptcy Rule 4003(b).

The auto accident referred to in Debtor's schedules occurred on December 5, 1992. Debtor was injured in the accident, and has not worked since. Prior to the accident, Debtor had operated a tavern for over twenty years in downtown Savannah, working a rigorous schedule of sixteen to eighteen hours per day, six days a week. Debtor testified that she has no educational background that would allow her to do work other than strenuous bar or restaurant work for which she is not now physically suited. She further testified that she made approximately \$2,000.00 per month prior to the injury, but has not earned any income since the injury. Debtor apparently depends upon family contributions to meet her living expenses.

Medical records introduced into evidence at the hearing reveal that Debtor was seen and released at the Memorial Medical Center emergency room immediately following the accident. Several days later, on December 14, 1992, Debtor visited the Westside Urban Health Center, where her arm was placed in a splint. On December 23, 1992, Debtor returned to the clinic for a brief follow-up visit.

In February of 1993, Debtor began seeing Dr. Julian D. Kelly, Jr., an orthopedic physician in Savannah. During her initial visit, Dr. Kelly noted that Debtor had

suffered "cervical soft tissue stress injury and presumed right wrist sprain due to auto accident." Debtor was seen by Dr. Kelly six more times through July of 1993. While she had a number of different complaints during the course of these visits, Dr. Kelly's final notes, dated July 21, 1993, show that her main complaint related to pain and occasional swelling of her right wrist. Dr. Kelly's notes indicate that, although he was unsure as to the exact cause of Debtor's discomfort in her wrist, he was unwilling to rule out the possibility that a sprain of the wrist at the time of the accident may have precipitated her symptoms. In either case, Dr. Kelly concluded that Debtor's condition should not prevent her from working entirely, although certain duties which would require stress of that wrist might need to be avoided. In his June 14 notes, Dr. Kelly also noted that she was receiving food stamps.

During the course of Debtor's visits with Dr. Kelly, he determined that she would benefit from a psychological/neuropsychological evaluation. Accordingly, in October of 1993, Debtor was referred to Dr. William A. Dickinson, a licensed clinical psychologist. In his testing sessions, Dr. Dickinson found Debtor's performance impaired only by her educational and sociocultural background, but not reflective of any neuropsychological deficit secondary to her head injury. He concluded that Debtor suffers from a reactive depression, which is a direct result of the motor vehicle accident, of a mild degree, with which she is coping without any antidepressant medications. He concluded that she "has a fairly good prognosis from the psychological perspective."

Also introduced into evidence were copies of Schedule "C" of Debtor's income tax returns, which showed net profit from her business of \$6,997.00 in 1991 and a net loss of \$2,372.00 in 1992. Debtor's Statement of Financial Affairs filed in the case show that she earned \$9,600.00 in 1991 and 1992 from self-employment.

On April 26, 1993, Debtor made application to the court to employ special counsel to represent her with respect to her claim for damages arising from the automobile accident. On July 8, 1993, the court entered an order approving the appointment of Jones, Boykin & Associates to represent Debtor in prosecuting her personal injury claim. On August 8, 1993, Debtor received a discharge in her case, and, on August 17, 1993, the case was closed without any resolution of Debtor's personal injury claim.

On April 14, 1994, a Motion to Approve Settlement and Allow Attorney's Fees was filed.¹ The Motion seeks approval to settle Debtor's personal injury claim for \$15,000.00 and to disburse this amount as follows:

- 1) \$5,000.00 in attorney's fees to special counsel;
- 2) \$206.38 as reimbursement for court costs to special counsel;
- 3) The remaining \$9,793.62 to Debtor under her claim of exemption.

Two creditors, as well as the Chapter 7 Trustee, filed objections to the

¹ It was determined that Debtor's case had been closed due to administrative error. Accordingly, an order reopening the case was entered on July 6, 1994.

Motion to Approve Settlement. The gist of the creditors' objections is that Debtor had acted in bad faith in her dealings with them prior to her bankruptcy and she should not, therefore, receive any of the proceeds from the settlement. Trustee's objection, on the other hand, is two-fold. First, he objects to the proposal to pay special counsel \$5000.00 in attorney's fees because he believes the effort expended by counsel in obtaining the settlement does not warrant payment of \$5000.00 in fees. Second, he objects to the payment of the balance of the proposed settlement to Debtor. Citing this court's decision in Matter of Solomon David Howard, Sr., Ch.7 No. 92-42015, slip op. (Bankr. S.D.Ga. May 17, 1994), Trustee contends that Debtor is entitled to exempt, at most, \$7,500.00 from the proposed settlement.

CONCLUSIONS OF LAW

Turning first to the issue of attorney's fees, I conclude that this portion of Trustee's objection must be overruled. In the Application for Approval of Employment of Attorney for Special Purpose, the terms of special counsel's proposed employment were clear:

The terms of the employment of the law firm of Jones, Boykin & Associates agreed to by Debtor, subject to the approval of the Court, are that said attorneys will undertake her representation pursuant to a contingency fee contract, based upon of one-third of any recovery which might be had against the responsible party."

No party in interest, including the Trustee, objected to the Application, and the court, after notice and a hearing, entered an order specifically approving the one-third contingency

arrangement. Consequently, Trustee cannot now be heard to object to special counsel receiving what he is entitled to under a fee arrangement contract that was signed by the Debtor and approved by this court without objection.

Turning next to this issue of whether Debtor is entitled to exempt the remaining \$9,793.62 from the bankruptcy estate, there is, in light of the Supreme Court's decision in Taylor v. Freeland & Kronz, -- U.S. --, 112 S.Ct. 1644, 118 L.Ed.2d 280 (1992) and the Eleventh Circuit's recent decision in In re Green, 31 F.2d 1098, No. 93-6844, slip op. (11th Cir. September 13, 1994), a question as to whether Trustee's and the other creditors' objections are time barred under section 522(l) of the Code and Rule 4003(b) of the Federal Rules of Bankruptcy Procedure. Section 522(l) provides that, "[u]nless a party in interest objects, the property claimed as exempt on [a debtor's] list [of exemptions] is exempt." Bankruptcy Rule 4003(b) sets the time limit for filing such an objection:

The trustee or any creditor may file objections to the list of property claimed as exempt within 30 days after the conclusion of the meeting of creditors held pursuant to Rule 2003(a) or the filing of any amendment to the list or supplemental schedules unless, with such period, further time is granted by the court . . .

Fed.R.Bankr.P. 4003(b).

The Supreme Court has construed these two provisions strictly, holding that when there is no objection by a party in interest within the time limit imposed under Rule

4003(b), the debtor's claim of exemptions must be considered conclusively correct, even if the debtor has no right to claim such an exemption under applicable law. Taylor, 112 S.Ct. at 1647-49. The facts of Taylor are almost identical to the facts of this case. There, the debtor reported the value of a lawsuit on her personal property schedule as "unknown", and similarly exempted the value of the lawsuit on her exemption schedule in an "unknown" amount. The suit was ultimately settled for \$110,000.00, an amount far in excess of Debtor's available exemption. Consequently, the trustee in the case demanded that the law firm representing the debtor in the suit turn the funds over to him as property of the estate. The law firm refused, arguing that they were entitled to retain the funds (presumably for the debtor's benefit) because the debtor had claimed the proceeds of the lawsuit as exempt.

The Court concluded that the trustee's failure to object within the time period set forth in Rule 4003 foreclosed him from subsequently contesting the debtor's exemption:

The Bankruptcy Court did not extend the 30-day period [of Rule 4003(b)]. Section 522(l) therefore has made the property exempt. [Trustee] cannot contest the exemption at this time whether or not Davis had a colorable statutory basis for claiming it.

Id. at 1648. Thus, the Court concluded that the debtor, by listing the value of the lawsuit and her exemption in it as "unknown", had claimed an exemption in the entire lawsuit, whatever its value was ultimately determined to be. And, because there was not a timely objection to

her claim of exemption by a party in interest, the debtor was entitled to retain the entire \$110,000.00 settlement, even though she had a right to exempt only a small portion of this amount under the relevant exemption statute.

The Eleventh Circuit has recently noted that "an unstated premise of the Court's holding [in Taylor] was that a debtor who exempts the entire reported value of an asset is claiming the 'full amount', whatever it turns out to be." Green, *supra*, slip op. at 3 (11th Cir. September 13, 1994). Thus, in Green, the Court concluded that a debtor who had valued a lawsuit stemming from an auto accident, as well as her exemption in the lawsuit, at one dollar, was entitled, under Taylor, to exempt all of a \$15,000.00 settlement of the lawsuit, where neither the trustee, or any other party in interest, had timely objected to the exemption. Id. at 5.

The only significant factual distinction between the instant case and Taylor and Green is that Debtor limited her claim of exemption to the "recovery of lost wages", whereas the debtors in Taylor and Green exempted the entire lawsuit. Thus, while it is clear that Trustee's failure to timely object to Debtor's listing of the value of any recovery of lost wages associated with the auto accident, as well as the value of her exemption in such recovery, as "Unknown", conclusively establishes Debtor's entitlement to exempt any and all recovery of lost wages stemming from the auto accident, the question of how much of the

\$15,000.00 settlement was compensation for lost wages remains.²

It is clear from the evidence produced at the hearing that Debtor suffered some minor physical injury and some degree of pain and suffering as a result of the accident. It is also clear that Debtor has not been gainfully employed, and therefore has had no income, since she was injured in the accident. Thus, the \$15,000.00 may have been paid to settle Debtor's potential claim for her physical injuries, her pain and suffering or her lost wages; the evidence is unclear on this point. Because the court has no rational basis for determining how the settlement should be allocated between Debtor's potential bases for damages, and because the Trustee bears the burden of proof in this matter,³ I conclude that Debtor is entitled to exempt all of the \$9,793.62 as a payment in compensation of her lost wages from the accident. The evidence is clear that the injury Debtor suffered in the accident has rendered her unsuitable for the only occupation for which she is trained. Thus, it is not unreasonable to conclude that the remaining \$9,793.62 is an appropriate amount to compensate for Debtor's lost wages.

It is perhaps appropriate to reiterate at this point that although the relevant Georgia statute limits a debtor's ability to exempt lost wages to the "loss of future earnings of the debtor . . . to the extent reasonably necessary for the support of the debtor and any

² The clear implication here is that, had Debtor exempted the entire lawsuit as the debtors in Green and Taylor had, then she would be entitled to the entire settlement, without the need of determining what the settlement was intended to compensate.

³ Fed.R.Bankr.Pro. 4000(c).

dependent of the debtor",⁴ a determination of what is reasonably necessary for the support of Debtor is not required in this case because Debtor has exempted all of her lost wages arising from the accident. Again, because she valued both her lost wages and her exemption therein as "unknown," and because the Trustee did not timely object, Taylor and Green dictate that Debtor gets any and all payment of lost wages arising from the accident, even though her exemption would otherwise be limited under O.C.G.A. § 44-13-100(a)(11)(E) to future earnings reasonably necessary for her support.

In light of the consternation which this ruling will likely cause among creditors, I am led to comment that I find this rule, and the result it renders, distasteful. That it is a wholly unworkable and unjust rule in the context of how a bankruptcy case is actually administered is manifest to anyone who is familiar with bankruptcy practice. As the Eleventh Circuit has noted, however, "responsibility for that rests with Congress and the Supreme Court." Green, *supra*, at 5. Accordingly, the objections to the Motion to Approve Settlement and Allow Attorney's Fees must be overruled and the \$15,000.00 in settlement proceeds distributed in the amounts requested in the Motion.

⁴ See O.C.G.A. Section 44-13-100(a)(11) (E) which provides, in relevant part, as follows:

(a) In lieu of the exemption provided in Code Section 44-13-1, any debtor who is a natural person may exempt, pursuant to this article, for purposes of bankruptcy, the following property:

(11) The debtor's right to receive, or property that is traceable to:

(E) A payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law IT IS THE ORDER OF THIS COURT that Debtor's personal injury claim arising from her December 5, 1992 auto accident be settled for the amount of \$15,000.00.

FURTHER ORDER OF THIS COURT that special counsel, Charles W. Snyder of Jones, Boykin & Associates, P.C., receive \$5000.00 in attorneys' fees and \$206.38 in compensation for cost of litigation.

FURTHER ORDER OF THIS COURT THAT Debtor, Kyo O. Swartz, receive the sum of \$9,793.62 in payment of her claim of exemption.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of September, 1994.