FILED
Lucinda B. Rauback, Clerk
United States Bankruptcy Court
Augusta, Georgia
By jpayton at 4:06 pm, Mar 07, 2016

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:	)	Chapter 7 Case
	)	Number 11-10218
THOMAS J. MCFARLAND	)	
	)	
Debtor	)	
	)	

AMENDED ORDER COMPELLING TURNOVER OF ASSETS

Thomas J. McFarland ("Debtor") has filed a "Motion to Reconsider and Rescind Orders Compelling the Turnover of Assets, Docket No. 271 and Docket No. 351." Dckt. No. 356. This Amended Order Compelling Turnover of Assets considers and amends this Court's previous order entered November 18, 2015, Dckt. No. 351. ("2015 Turnover Order").[1] The Court has jurisdiction over these matters pursuant to 28 U.S.C. §1334(b) and this is a core proceeding under 28 U.S.C. §157(b)(2)(A), (B), (E) and (O).

FINDINGS OF FACT

The 2015 Turnover Order compelled Debtor to turnover the following three assets: 1) $4,627.83 in cash or certified funds; 2) any and all documents in his possession relating to his ownership of

[1] The Motion for Reconsideration also seeks redress regarding a different order entered by this Court in 2013 at Dckt. No. 271. Debtor's Motion for Reconsideration as to the 2013 order is addressed in a separate order.

American General Insurance Policy number XXX922 ("AGI Policy"); 3) any and all documents in his possession relating to his ownership of the Hartford Annuity Contract XXXX041 ("Annuity"). The 2015 Turnover Order further provided that "the Trustee is vested with all rights of ownership in [the AGI Policy and the Annuity], including, but not limited to, the right to cash in, surrender, or cancel the policy or to otherwise take possession of the cash value of the policy, and to liquidate the annuity." Dckt. No. 351, at 2.[2] The Order was issued after the Eleventh Circuit's affirmation of the District Court's and this Bankruptcy Court's rulings denying Debtor's claim of exemptions as to these assets. Dckt. Nos. 345, 344, 309, 249, and 202, respectively.

After the entry of the Eleventh Circuit's final order, the Chapter 7 Trustee ("Trustee") filed a Motion to Compel the Turnover of Assets ("Motion to Compel"). Dckt. No. 346. The Trustee argues he is entitled to an order vesting him with all rights of ownership in the Annuity and the AGI Policy,[3] including the right to cash in, surrender or cancel the AGI Policy and liquidate the Annuity. Dckt.

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[2] The order further provided that upon receipt of the cash value of the AGI Policy, the Trustee is authorized and directed to pay the Debtor $2,000.00 in full satisfaction of his O.C.G.A. §44-12-100(a)(9) exemption. Dckt. No. 351, at 2.

[3] Subject to Debtor's $2,000.00 exemption in the AGI Policy pursuant to O.C.G.A. §44-12-100(a)(9).

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No. 346, at 3, ¶7. The proposed order submitted at the time the motion was filed provides the relief requested in the motion.[4] Dckt. No. 346-1.

Debtor's initial response to the Motion to Compel acknowledges the Eleventh Circuit's holding that the Debtor may not exempt the AGI Policy or the Annuity. Dckt. No. 349, at 1, ¶2. "The Court's orders speak for themselves, and the issue of whether or not these assets are exempt has been decided on a final basis. The issue of whether these assets are property of the estate pursuant to 11 U.S.C. §541 remains undetermined." Id. at 2, ¶3. Debtor then proceeds to argue the AGI Policy and Annuity are not property of Debtor's bankruptcy estate pursuant to O.C.G.A. §33-25-11 and the Eleventh Circuit's opinion in In re Meehan, 102 F.3d 1209 (11th Cir. 1997).

Then, on the eve of the hearing on the Motion to Compel, Debtor filed his sixth amendment to exemptions asserting the assets are not property of the estate and claiming the Annuity as exempt under O.C.G.A. §44-13-100(a)(8).[5] Dckt. Nos. 10, 47, 126, 141, 256,

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[4] Pursuant to Local Bankruptcy Rule 9072-1(a), a proposed order is required to be submitted with every motion filed.

[5] In the previous proceedings Debtor argued the AGI Policy was exempt under O.C.G.A. §44-13-100(a)(8), but he did not assert this argument as to the Annuity until after the Eleventh Circuit's final order was entered and the Trustee filed the Motion to Compel.

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and 353. Throughout the previous four years of contentious litigation, Debtor argued before this Court, the District Court, and the Eleventh Circuit that the Annuity was exempt pursuant to O.C.G.A. §§18-4-22 and 44-13-100(a)(2)(E).

At the conclusion of the hearing on the Motion to Compel, the Court issued an oral ruling granting the Motion to Compel and overruling Debtor's objection. The oral ruling found the principles of res judicata, or claim preclusion, bar Debtor from raising these new arguments. Alternatively, the oral ruling overruled Debtor's objections on the merits based upon this Court's previous ruling in In re Mohr, Ch. 7 Case No. 13-11606, Dckt. No. 525 (Bankr. S.D. Ga. Oct. 29, 2015)(currently on appeal, Dckt. No. 537).[6] A short order compelling the turnover of the assets incorporating the oral ruling from the bench was issued thereafter. Dckt. No. 351.

After entry of this order, Debtor filed a Motion for Reconsideration. In the Motion for Reconsideration, Debtor now argues the Trustee has no right under applicable law to the surrender, cancellation or liquidation of the AGI Policy or Annuity. Dckt. 356, at 5, ¶18. Prior to the hearing on the Motion for Reconsideration, Debtor filed a Notice of Appeal. Dckt. No. 368.

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[6] Debtor's counsel also represents Mr. Mohr in his chapter 7 proceedings.

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At the hearing on the Motion for Reconsideration, Debtor raised two additional arguments. First, Debtor questioned the Bankruptcy Court's jurisdiction to entertain the Motion for Reconsideration once Debtor filed his Notice of Appeal. Second, Debtor contends this Court's 2015 Turnover Order was improper because Bankruptcy Rule 7001 provides such relief may only be obtained through an adversary proceeding and it cannot be awarded via a contested matter.

For the following reasons, the Court finds it has the jurisdiction to address the Motion for Reconsideration. The relief requested and awarded, as amended herein, does not require the filing of an adversary, and res judicata bars Debtor from raising new property of the estate and exemption arguments.

CONCLUSIONS OF LAW

Debtor attempts to raise the following six arguments to exclude the Annuity and AGI Policy from the reach of the Trustee and his creditors.[7] First, Debtor questions whether this Court retains jurisdiction to enter this order since Debtor filed a Notice of Appeal of the 2015 Turnover Order. Second, Debtor contends neither

[7] As previously discussed in prior orders, Debtor has one main creditor in this bankruptcy, Joylynn Hagen. Ms. Hagen obtained a large pre-petition personal injury verdict against Debtor which precipitated Debtor's bankruptcy.

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the Annuity nor the AGI Policy are property of his bankruptcy estate. Third, Debtor contends if the Annuity or AGI Policy are property of the bankruptcy estate, they are exempt from the reach of his creditors pursuant to O.C.G.A. §33-25-11 and the Eleventh Circuit's binding precedent in In re Meehan, 102 F.3d 1209 (11th Cir. 1997). Fourth, Debtor argues the Annuity is exempt pursuant to O.C.G.A. §44-13-100(a)(8). Fifth, he contends the relief provided in the 2015 Turnover Order may only be granted pursuant to an adversary proceeding and it was improper for this Court to grant the relief in a contested matter. Finally, Debtor contends the Trustee is only entitled to the cash surrender value of the AGI Policy and the order granting relief to liquidate the AGI Policy and Annuity is too broad.

Jurisdiction after Notice of Appeal / Rule 8002(b).

First, this Court retains jurisdiction to address the matters raised in the Motion for Reconsideration which was filed prior to the filing of the Notice of Appeal. See Dckt. Nos. 356 and 368. Bankruptcy Rule 8002(b)(1) provides in pertinent part:

> (b) Effect of a motion on the time to appeal
>
> (1) In general
>
> If a party timely files in the bankruptcy court any of the following motions, the time to file an appeal runs for all parties from the entry of the order disposing of the last such

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remaining motion:

> (A) to amend or make additional findings under Rule 7052, whether or not granting the motion would alter the judgment;
> (B) to alter or amend the judgment under Rule 9023;
> (C) for a new trial under Rule 9023; or
> (D) for relief under Rule 9024 if the motion is filed within 14 days after the judgment is entered.

Fed. R. Bankr. P. 8002(b). Bankruptcy Rule 8002(b)(2) provides "[i]f a party files a notice of appeal after the court announces or enters a judgment, order, or decree--but before it disposes of any motion listed in subdivision (b)(1)--the notice becomes effective when the order disposing of the last such remaining motion is entered." Fed. R. Bankr. P. 8002(b)(2). "If the appellant files an appeal before an [sic] R[ule] 8002(b)(1) motion is decided . . . the R[ule] 8002(b) motion should be decided before the appeal goes forward. In re Moore, 2015 WL 5674430, *5 (Bankr. D.N.J. Sept. 25, 2015) citing In re Markowitz, 190 F.3d 455, 460-61 (6th Cir. 1998). The pendency of the notice of appeal does not "divest" the Bankruptcy Court's jurisdiction to hear the Rule 8002(b)(1) motions. Fed. R. Bankr. P. 8002(b)(2); In re Nzeribe, 2008 WL 7842068, *1 (Bankr. N.D. Ga. Jan. 31, 2008)("While the filing of a notice of appeal generally transfers jurisdiction of the issues on appeal from

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the bankruptcy court to the district court, Debtor filed his Motion for Reconsideration prior to filing his Notice of Appeal, thus invoking Federal Rule of Appellate Procedure 4(a)(4))".[8] For these reasons, the Bankruptcy Court retains jurisdiction to consider the Motion for Reconsideration which was filed prior to the Notice of Appeal.

Res Judicata.

Debtor's efforts to exempt the Annuity and AGI Policy were key aspects of this Court's 2013 order. In re McFarland, 500 B.R. 279 (Bankr. S.D. Ga. 2013) ("2013 Exemption Order"). In fact, the issuance of this Court's final order was delayed awaiting the Georgia Supreme Court's ruling on an issue related to the Annuity. Ultimately, the District Court for the Southern District of Georgia and the Eleventh Circuit Court of Appeals affirmed this Court's 2013 Exemption Order finding Debtor was not entitled to the exemptions he claimed on appeal. See Dckt. Nos. 345, 344, 309, 249 and 202.

After losing his appeal, Debtor seeks to restart the process by raising new arguments. First, Debtor argues the Annuity and AGI Policy are not property of the Debtor's bankruptcy estate. In the event the Court finds they are property of the estate, Debtor

[8] Rule 8002(b) "is essentially the same as Rule 4(a)(4) of the F. R. App. P." Fed. R. Bankr. P. 8002 Advisory Committee's Note.

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asserts they are exempt. These arguments are barred by res judicata.

Res judicata bars a subsequent action if in the prior litigation: (1) there is a final judgment on the merits; (2) the decision was rendered by a court of competent jurisdiction; (3) the parties, or those in privity with them, are identical in both suits; and (4) the same cause of action is involved in both cases. Ragsdale v. Rubbermaid, Inc., 193 F.3d 1235, 1238 (11th Cir. 1999). "It is by now hornbook law that the doctrine of res judicata 'bars the filing of claims which were raised or could have been raised in an earlier proceeding.'" Maldonado v. U.S. Attorney Gen., 664 F.3d 1369 (11th Cir. 2011), (citing Ragsdale v. Rubbermaid, Inc., 193 F.3d at 1238).

When considering the application of res judicata, "[w]e evaluate the similarity of two causes of action by looking to the 'broad nucleus of operative facts' of the actions . . . . To do so, we 'will line up the former and current cases side-by-side to assess their factual similarities.'" Reddy v. Gilbert Med. Transcription Serv., Inc., 588 F. App'x 902, 903-04 (11th Cir. 2014) citing Borrero v. United Healthcare of New York, Inc., 610 F.3d 1296, 1308-09 (11th Cir. 2010). In the current case, when the nucleus of operative facts are considered and these claims are lined up side-

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by-side to assess their factual similarities it is clear Debtor could have, and should have, raised these legal theories in the previous proceedings.

In this case, from the 2011 petition date through the Eleventh Circuit's order, Debtor has always argued the Annuity is exempt pursuant to O.C.G.A. §18-4-22 and §44-13-100(a)(2)(E). Dckt. Nos. 10, 47, 126, 141, 256. Through the Eleventh Circuit appeal process, Debtor attempted to exempt the AGI Policy pursuant to O.C.G.A. §44-13-100(a)(8)-(9) and O.C.G.A. §33-25-11. Id. It is not until after the Eleventh Circuit's final order and in response to the Trustee's Motion for Turnover does the Debtor try to repackage the arguments to contend that the Annuity and the AGI Policy are not property of Debtor's bankruptcy estate, and they are exempt under new theories. Dckt. Nos. 349, 353 and 356. In fact, some of Debtor's current arguments are the arguments he previously made to the Eleventh Circuit and the underlying courts. See generally, Dckt. Nos. 384, Debtor's Br.; 349; In re McFarland, 790 F.3d 1182, 1189-92 (11th Cir. 2015). Such arguments are now barred by res judicata.

Property of the Estate.

Property of the estate arguments could have, and should have been, raised in the previous proceedings. The commencement of

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a bankruptcy case creates a bankruptcy estate. 11 U.S.C. §541(a). The bankruptcy estate consists of all Debtor's legal and equitable interests in property as of the commencement of the bankruptcy case. 11 U.S.C. §541(a)(1). Exemptions are a fundamental concept in bankruptcy. They allow debtors to exempt certain property from their bankruptcy estate and the reach of their creditors. This insures debtors their fresh start after bankruptcy. Exemption arguments are not applicable to property that is not property of Debtor's bankruptcy estate.

> An estate in bankruptcy consists of all the interests in property, legal and equitable, possessed by the debtor at the time of filing, as well as those interests recovered or recoverable through transfer and lien avoidance provisions. An exemption is an interest withdrawn from the estate (and hence from the creditors) for the benefit of the debtor. Section 522 determines what property a debtor may exempt . . . . Property that is properly exempted . . . is (with some exceptions) immunized against liability for prebankruptcy debts. § 522(c). No property can be exempted (and thereby immunized), however, unless it first falls within the bankruptcy estate. Section 522(b) provides that the debtor may exempt certain property 'from property of the estate'; obviously, then, an interest that is not possessed by the estate cannot be exempted.

Owen v. Owen, 500 U.S. 305, 308 (1991)(emphasis in original); In re McFarland, 790 F.3d 1182, 1185 (11th Cir. 2015)("Under federal law, when a debtor files for bankruptcy his property becomes part of the

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bankruptcy estate and is thereby exposed to creditors . . . . [T]he debtor, however, may exempt certain types of property from this exposure."); In re Hainlen, 365 B.R. 288, 290 (Bankr. S.D. Ga. 2007)("[T]he Court finds the interest is not 'property of the estate' under §541(c)(2) and therefore the exemption issue need not be addressed."). This property of the estate argument is one that could have been, and should have been, raised in the previous proceedings. Res judicata bars Debtor from raising these arguments at this point in the proceedings.

Exemptions.

After the entry of the Eleventh Circuit's final order, Debtor amended his schedules for the sixth time in an effort to raise different statutory exemption theories than previously asserted. Dckt. No. 353 He attempts to avoid the implications of res judicata through the general rule in bankruptcy that debtors may freely amend their schedules. Fed. R. Bankr. P. 1009(a). However, Bankruptcy Rule 1009(a) does not trump or foreclose the application of res judicata where a debtor could have raised such arguments in the prior litigation, and failed to do so. In re Gress, 517 B.R. 543, 548-49 (Bankr. M.D. Pa. 2014)("Claim preclusion is relevant in the context of resolving objections to debtor's claim of exemption . . . . Claim preclusion bars matters that could have been raised

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and defenses that could have been asserted as well as those actually raised. Therefore, a debtor cannot later amend his exemptions to relitigate the issue even if the exemption is being asserted under another provision of [the exemption statute]. . . . Debtors cannot continue to file amendments [after entry of a non-appealable final order] in a never-ending effort to exempt items that are subject to the Turnover Order."); In re Wilson, 446 B.R. 555, 563 (Bankr. M.D. Fla. 2011)(Res judicata mandates that claims of exemption that could have or should have been raised in a previous action but were not, cannot be asserted later) citing Precision Air Parts, Inc. v. Avco Corp., 736 F.2d 1499, 1503, n. 4 (11th Cir. 1984); Gatzemeyer v. Vogel, 589 F.2d 360, 363 (8th Cir. 1978)(Res judicata bars attempts to subsequently assert an alternative theory of recovery when such arguments could have, and should have, been asserted in the previous litigation). For these reasons, Debtor cannot raise new exemption arguments or relitigate arguments he previously lost on appeal.

Procedural Argument.

The fact that the prior arguments were addressed pursuant to the Trustee's objection to Debtor's claim of exemptions rather than a motion to turnover does not foreclose the application of res judicata. See generally, Tobkin v. Calderin (In re Tobkin), 2015 WL 7144748, at *2-3 (11th Cir. Nov. 16, 2015). The Motion to Compel

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the turnover of these assets is the culmination of the Trustee's successful objection to the Debtor's claim of exemption as to these assets. It is the Trustee's statutory duty to collect the non-exempt property of the estate and reduce it to money. 11 U.S.C. §§704 and 726. The Trustee clearly prevailed on these assets being property of the estate, as amended herein, and is now pursuing the mechanism to fulfill his statutory duty. The Trustee's filing the motion to compel turnover of assets does not afford the Debtor a second bite at the apple on issues that could have been previously raised.

Reconsideration / Conclusion.

In the prior proceedings, Debtor argued the AGI Policy was exempted pursuant to O.C.G.A. §33-25-11(c) and the Eleventh Circuit's order in In re Meehan, 102 F.3d 1209 (11th Cir. 1997). Dckt. No. 348. The Eleventh Circuit expressly denied such arguments as to the AGI Policy. In re McFarland, 790 F.3d 1182, 1189-91. (11th Cir. 2015). Debtor's attempts to reassert these same arguments regarding the AGI Policy and raise them as to the Annuity are barred by res judicata and counsel improperly attempts to relitigate the issue. See generally, Dckt. Nos. 384, Debtor's Br.; 349; In re McFarland, 790 F.3d 1182, 1189-92 (11th Cir. 2015).

Furthermore, in the oral ruling issued from the bench on

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November 18, 2015 and incorporated into the 2015 Turnover Order the Court denied Debtor's motion even considering the merits of his argument pursuant to 11 U.S.C. §541(c), O.C.G.A. §33-25-11, and In re Meehan. Dckt. No. 351. Section 541(c) provides in pertinent part:

> (c)(1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law-
>
> > (A) that restricts or conditions transfer of such interest by the debtor; or
> >
> > (B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.
>
> (2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

11 U.S.C. §541(c) (emphasis added). First, this provision provides except as provided in §541(c)(2), the property becomes part of the

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bankruptcy estate notwithstanding anti-alienation language. 11 U.S.C. §541(c)(1). To be excluded from property of the estate pursuant to 11 U.S.C. §541(c)(2) the restriction must involve an interest "in a trust". Id. There has been no evidence that the Annuity or the AGI Policy are trusts by themselves or by statutory provisions. In In re Meehan, it was undisputed the parties were dealing with a trust. In re Meehan, 102 F.3d 1209, 1211 n. 4 (11th Cir. 1997)("Apparently only beneficial interest in trusts qualify for the § 541(c)(2) exclusion. 11 U.S.C. §541(c)(2)(referring to '[a] restriction on the transfer of a beneficial interest of the debtor in a trust.'). No argument is made that Meehan's IRA is not a trust. Moreover, by definition, an IRA is a trust."); In re Mohr, Ch. 7 Case No. 13-11606, Dckt. No. 522 (Bankr. S.D. Ga. Oct. 29, 2015); In re McFarland, 790 F.3d 1182, 1191 (11th Cir. 2015)("In Meehan, in particular, we held pursuant to 11 U.S.C. §541(c)(2) that a bankruptcy debtor could exclude his IRA from the bankruptcy estate by using an 'applicable' non-bankruptcy Georgia statute."). The language of O.C.G.A. §33-25-11(c) does not create a trust, or allow Debtor the opportunity to exempt the Annuity or the AGI Policy from his bankruptcy estate. For these reasons, Debtor's 11 U.S.C. §541, O.C.G.A. §33-25-11, and In re Meehan arguments are alternatively denied on its merits.

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Finally, motions for reconsideration are only used in limited circumstances.[9] In re Barber, 318 B.R. 921 (Bankr. M.D. Ga. 2004). They are

> not intended to provide the parties an opportunity to relitigate previously-decided matters or present the case under new theories. Rather, such motions are intended to allow for the correction of manifest errors of fact or law, or for the presentation of newly-discovered evidence . . . . A party may not use a [motion for reconsideration] to raise arguments available but not advanced at the hearing. [They are] not designed to furnish a vehicle by which a disappointed party may reargue matters already argued and disposed of, nor [are they] aimed at providing a mechanism by which new arguments or legal theories, which could and should have been raised prior to the issuance of judgment, can be later advanced . . . . Attempts to take a second bite at the apple, to introduce new legal theories, or to pad the record for an appeal, constitute an abuse of the [motion for reconsideration process], which the court will not condone . . . . A party's failure to present his strongest case in the first instance does not entitle him to a second chance. . . . [The Movant] is using this Motion as an opportunity to relitigate arguments which have already been made and to raise new legal theories he had not thought of at the time of the hearing. This is not the proper use of a Motion to Reconsider, thus the

[9] While Debtor's pleading fails to cite a statutory basis for the motion for reconsideration, when such motions are filed within fourteen days of the entry of an order they are generally addressed pursuant to Fed. R. of Civ. P. 59(e), made applicable to bankruptcy proceedings pursuant to Fed. R. Bankr. P. 9023. APR Energy LLC v. First Inv. Group Corp., 2015 WL 736236, at *3 (M.D. Fla. Feb. 20, 2015).

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Motion is denied.

Id. at 923-25 (internal citations and quotations omitted). Likewise, Debtor's Motion for Reconsideration is denied as an attempt to assert new legal theories or relitigate matters already decided.

Contested Matter / Adversary.

Debtor also argues for the first time in his Motion for Reconsideration that the relief requested by the Trustee as to the Annuity and the AGI Policy can only be obtained through an "adversary proceeding," and cannot be obtained through a "contested matter." See Fed. R. Bankr. P. 7001 and 9014. For the reasons discussed below, I disagree.

The Federal Rules of Bankruptcy Procedure distinguish between "adversary proceedings" and "contested matters." See Fed. R. Bankr. P. 7001 and 9014. Adversaries are lawsuits commenced with the filing a complaint and the issuance of a summons. Fed. R. Bankr. P. 7001, 7003 and 7004. Adversary proceedings are enumerated under Rule 7001 and incorporate much of the Federal Rules of Civil Procedure. Fed. R. Bankr. P. 7001 Advisory Committee's Note. Rule 7001 lists ten types of matters which must be brought as adversary proceedings. Fed. R. Bankr. P. 7001. For purposes of this opinion, the focus is on Rule 7001(1) and (2) which provide:

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> An adversary proceeding is governed by the rules of this Part VII. The following are adversary proceedings:
>
> > (1) a proceeding to recover money or property, other than a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under § 554(b) or § 725 of the Code, Rule 2017, or Rule 6002;
> >
> > (2) a proceeding to determine the validity, priority, or extent of a lien or other interest in property, other than a proceeding under Rule 4003(d)....

Fed. R. Bankr. Proc. 7001(1)-(2).

Contested matters are not enumerated by the Bankruptcy Code, but the Advisory Committee Note to Bankruptcy Rule 9014 states "[w]henever there is an actual dispute, other than an adversary proceeding, before the bankruptcy court, the litigation to resolved that dispute is a contested matter." Fed. R. Bankr. P. 9014, Advisory Committee's Note. "In a contested matter not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought." Fed. R. Bankr. P. 9014(a); see also In re Fisher Island Invs., Inc., 778 F.3d 1172, 1194 (11th Cir. 2015). Contested matters are governed by a motions practice, but the "[m]otions shall be served in [contested matters] in the manner provided for service of the summons and complaint by Rule

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7004." Fed. R. Bankr. P. 9014(b); see also General Order 2003-1 (Bankr. S.D. Ga. 2003)(all hearings are evidentiary unless noted otherwise). In addition, many of the federal civil procedure rules and rules regarding adversaries are applicable in contested matter proceedings. Fed. R. Bankr. P. 9014(c).

In the current matter, these proceedings arose out of an objection to Debtor's claim of exemptions and a motion for turnover which are contested matters, not adversary proceedings. Dckt. Nos. 242 and 257. "[T]he filing of an objection to . . . a claim of exemption . . . creates a dispute that is a contested matter." Fed. R. Bankr. P. 9014, Advisory Committee Note. Rule 7001(1) expressly excludes from adversary proceedings "a proceeding to compel the debtor to deliver property to the trustee." Fed. R. Bankr. P. 7001(1). The Advisory Committee Notes make it clear that "[a] trustee may proceed to recover property of the debtor" by motion. Fed. R. Bankr. P. 7001(1), Advisory Committee's Note to 1987 amendment.

In this case, it is undisputed that Debtor is the owner of the AGI Policy and the Annuity, but Debtor now argues his son and wife may also have ownership rights in the AGI Policy and Annuity and those policies cannot be liquidated without an adversary proceeding to afford these third parties with due process. I

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disagree.

As to the AGI Policy, at the hearing the Trustee stated he was only interested in the cash surrender value of the AGI Policy (less the $2,000.00 exemption).[10] As a result, the 2015 Turnover Order is amended as detailed below requiring the Debtor to tender the cash surrender value of the AGI Policy to the Trustee, less the $2,000.00 exemption. This moots Debtor's objection as to the liquidation of the AGI Policy requiring an adversary proceeding.

As for the Annuity, the Eleventh Circuit's final order denied Debtor's exemption to the Annuity. The Debtor may not exempt the Annuity and it is property of the estate and the Trustee is entitled to liquidate the Annuity in the fulfillment of his statutory duties. In re McFarland, 790 F.3d 1182 (11th Cir. 2015); see also 11 U.S.C. §704(a)(1). This does not require an adversary. See generally, In re Hupton, 287 B.R. 438 (Bankr. N.D. Iowa 2002)(a contested matter denying debtor's exemption in an annuity finding the Trustee was entitled to liquidate the annuity, and denying debtor's motion for reconsideration); In re Michael, Chap. 7 Case No. 04-80726, Dckt. No. 44 (Bankr. N.D. Ga. Nov. 9, 2005)(consent order directing the turnover of a non-exempt annuity in a contested

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[10] O.C.G.A. §44-13-100(a)(9)(allowing $2,000.00 exemption in the policy).

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matter); In re Taronji, 174 B.R. 964, 966 (Bankr. N.D. Ill. 1994)(a trustee's motion for turnover of corporate stock is a contested matter); In re Toledano, 299 B.R. 284, 299 (Bankr. S.D. N.Y. 2003)(Rule 7001 was specifically amended to allow the trustee to proceed against the debtor by contested matter and 11 U.S.C. §521 requires the debtor to surrender property of the estate to the trustee).

Furthermore, a review of the AGI Policy and the Annuity which have been tendered into evidence shows Debtor is the owner of the AGI Policy and the Annuity. Debtor's Ex. 1, Hr'g Jan. 19, 2012. As to the Annuity, as noted in this Court's 2013 Order Findings of Fact:

> Debtor is both annuitant and the contract owner. Presently, Debtor's wife is the beneficiary under the terms of the Annuity. As owner and annuitant, Debtor is free to change the contract owner and the beneficiary. Debtor also may cancel the Annuity contract at any time.

In re McFarland, 500 B.R. 279, 282 (Bankr. S.D. Ga. 2013)(internal citations omitted). Debtor may cancel the Annuity at any time and he may change the beneficiary. Id. Debtor has not disputed these findings. The Annuity is non-exempt and the Trustee can fulfill his statutory duty by reducing the Annuity to money for distribution. 11 U.S.C. §704(a)(1). The Trustee is authorized to exercise

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Debtor's rights under the Annuity which does not require the filing of an adversary or the involvement of Debtor's wife or son.

Finally, even if the proceeding should have been an adversary "the requirement that a bankruptcy court make this finding in an adversary proceeding derives from the Bankruptcy Rules . . . which are 'procedural rules adopted by the Court for the orderly transaction of its business' that are 'not jurisdictional.'" United Student Aid Funds, Inc. v. Espinosa, 130 S.Ct. 1367, 1378 (2010), citing Kontrick v. Ryan, 540 U.S. 443, 454, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004). All the notice necessary to provide the proper parties with due process has been provided and the Trustee is entitled to exercise Debtor's rights thereunder.

For these reasons, it is therefore ORDERED that:

1. Pursuant to Federal Rule of Bankruptcy Procedure 8002(b), this Court retains jurisdiction to enter this Amended Order Compelling the Turnover of Assets;

2. Except as stated herein, Debtor's Motion to Reconsider is DENIED;

3. The Court's prior Order entered November 18, 2015 is HEREBY AMENDED AND RESTATED as follows: Debtor's Motion for Reconsideration is DENIED.

IT IS ORDERED that Debtor's objection to the Trustee's

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Motion to Compel Turnover of the assets and Motion for Reconsideration is OVERRULED as provided herein.

IT IS FURTHER ORDERED that the Debtor shall immediately turn over to the Trustee the following assets of the bankruptcy estate in his possession: cash or certified funds in the amount of $4,627.83;[11] any and all documents in his possession relating to his ownership of Hartford Leaders 3 Variable Annuity Contract XXX8041, including, but not limited to, the original contract.

IT IS FURTHER ORDERED that the Trustee is vested with all rights of ownership in Hartford Leaders 3 Variable Annuity Contract XXX8041, including, but not limited to, the right to cash in, surrender, or cancel the annuity contract or to otherwise take possession and to liquidate the Annuity.

IT IS FURTHER ORDERED that Debtor shall tender the cash surrender value of policy # XXX922 issued by American General Life Insurance Company within thirty (30) days hereof.

IT IS FURTHER ORDERED that upon receipt of the cash value of the life insurance policy, the Trustee is authorized and directed to pay to the Debtor the sum of $2,000.00 in full and final

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[11] Debtor did not dispute this portion of the 2015 Turnover Order and at the hearing Debtor's counsel stated there was no opposition to the turnover of these funds. Tr. Hr'g Nov. 18, 2015, 19:25-20:1-6, Dckt. No. 381.

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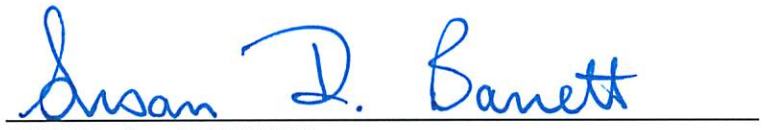
satisfaction of the Debtor's claim of exemption in the cash value of life insurance policy # XXX922.



SUSAN D. BARRETT
CHIEF UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 7th Day of March, 2016.

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