

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

CARL LESLIE DALMATA
LINDA MARIE DALMATA,

CASE NO. 88-01696

Debtors

APPEARANCES:

ONOFRIO J. PULEO, ESQ.
Attorney for Debtors
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Utica, New York 13501

RANDY J. SCHAAL, ESQ.
Trustee
100 West Seneca Street
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STEPHEN D. GERLING, U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On November 3, 1988, Carl Leslie Dalmata and Linda Marie Dalmata ("Debtors") filed a voluntary joint petition under Chapter 7 of the Bankruptcy Code, 11 U.S.C.A. §§101-1330 (West 1979 and Supp. 1989) ("Code"). Within that petition, the Debtor husband claimed a homestead exemption on property located at 307 Pleasant Street, Utica, New York to which the Trustee filed an Objection on December 15, 1988. An evidentiary hearing was held in Utica, New York on June 7, 1989 at which both parties appeared for the purpose of determining whether Debtor husband's claimed homestead exemption is, in fact, exempt from property of the estate. Debtors thereafter filed amendments to their petition seeking to exempt the Debtors' state and federal income tax refunds and

Debtor Carl Dalmata's interest in a pending civil action. The Trustee objected to each of Debtors' amending exemptions.

The Court's decision regarding the Debtors' three claimed exemptions are consolidated here in the opinion below.

JURISDICTION

Sections 1334 and 157(a) of Title 28 (West Supp. 1989) give rise to the Court's jurisdiction over the subject matter. The following are core matters under 28 U.S.C. §1334 and 157(b)(1), (2)(B) (West 1979 Supp. 1989) ("Code"), and governed by Bankruptcy Rules ("Bankr.R.") 4003, 7052 and 9014.

I. Homestead Exemption

The Debtors claim as exempt, under New York Debtor and Creditor Law ("NYD&CL") §282 (McKinney Supp. 1989) and New York Civil Practice Law and Rules ("NYCPLR") §5206 (McKinney Supp. 1989), the Debtor Carl Dalmata's complete interest in property located at 307 Pleasant Street, Utica, New York as the Debtors' principal residence.

The Trustee objects to the Debtors' claimed homestead exemption alleging: 1) the property is owned as a partnership asset and not as a principal residence; and 2) if the property is subject to the homestead exemption only the half occupied as a principal residence gives rise to the homestead exemption.

a. Findings of Fact

In October 1985, the Debtor husband, Carl Dalmata, together with Thomas Olsen and Michael Diamond, purchased the subject property consisting of a two-family apartment building and held it as tenants in common as evidenced by the deed. Both Debtors have resided in one of the two apartments in the subject property since the purchase.

In 1987 the Debtor husband entered into a written agreement with Olsen and Diamond regarding the rights and duties of the three parties with respect to the subject real property. The written agreement indicates that the property was purchased, prior to the creation of the partnership, as joint property. It required that the profits, losses and liabilities flowing from the subject property were to be shared equally. The agreement also specified that the parties to the agreement were to be referred to as "partners." Debtor Carl Dalmata also filed a federal partnership tax return for tax year 1988 which lists as partners the same parties that executed the agreement. It also provides the purchase date of the subject property (October 1985), as the date on which the "business" began.

At the June 7, 1989 hearing, Debtor husband's testimony revealed that the property was purchased in this manner because he could not afford to purchase a house without the financial assistance of Olsen and Diamond. He testified that it was agreed that he and his wife would live in one of the apartments and pay rent to the other two parties either directly or through a checking account. Debtor husband testified that the other apartment was to be and is currently rented out to a third party whose rent is deposited in

the same checking account. The account, according to Debtor husband's testimony, is used to pay the mortgage and monthly expenses for the building.

On November 3, 1988 the Debtors filed their bankruptcy petition. Among the property listed on their Schedule is the property "owned by partnership consisting of" the Debtor husband, Olsen and Diamond. The total equity in the building is \$10,777.85. Debtors list a 1/3 interest in this property in their Schedule B-2 Personal Property under "V. Interest in partnerships." Debtors claim as exempt in Schedule B-4 their interest in the subject property pursuant to the homestead exemption found in NYCPLR §5206(a). The Trustee objects to this exemption claiming NYCPLR §5206(a) is not applicable to the Debtors' interest in this property.

The first issue thus presented is whether the subject property is an asset of a partnership and if so whether it is "real property...owned...as a principal residence" within the meaning of NYCPLR §5206 and, therefore, exempt from property of the estate. ¹

b. Discussion

¹. The issue of whether the subject property is owned by a partnership rather than as a tenancy in common is not addressed in the Debtors' Memorandum of Law. Indeed, Debtors' counsel replied in the negative when asked at the June 7, 1989 hearing whether, if found to be owned by a partnership, the subject property would still be exempt under NYCPLR §5206.

Pursuant to Code §522(b)(1) New York State has opted out of the federal bankruptcy exemption provisions set forth in Code §522(d).

NYD&CL §284 (McKinney 1978 & Supp. 1989). Debtors domiciled in New York are allowed only the exemptions provided by NYD&CL §§282 and 283.

The question concerning the existence of a partnership as owner of the subject property requires analysis of New York partnership law. The party claiming the existence of a partnership has the burden of proving that the partnership exists. Ramirez v. Goldberg, 82 A.D.2d 850, 852, 439 N.Y.S.2d 959, 961 (N.Y.App.Div. 1981). A partnership may be created by agreement relating to a single transaction in the sale or purchase of land. Blair v. Scimone, 26 A.D.2d 751, 752, 272 N.Y.S.2d 75, 77 (N.Y.App.Div. 1966); Schneider v. Brenner, 134 Misc. 449, 450, 235 N.Y.S. 55 (N.Y.Sup.Ct. 1929). Also, the determination of a debtor's bankruptcy exemptions is made as of the date the bankruptcy petition is filed. In re Warren, 28 B.R. 290, 291 (Bankr.N.D.N.Y. 1984).

Where a written agreement exists, no question of fact is present unless the intent of the parties to the agreement is ambiguous. Mallard Const. Corp. v. County Fed. Savings & Loan Ass'n., 32 N.Y.2d 285, 291, 344 N.Y.S.2d 925, 930, (N.Y. 1973); Boyarski v. Froccaro, 131 A.D.2d 710, 516 N.Y.S.2d 775, (N.Y.App.Div. 1987). If the intent of the parties is unclear and the intent cannot be conclusively drawn from the terms of the written contract then the court must determine intent by considering the transactions and

statements made by the alleged partners. See Heye v. Tilford, 2 App.Div. 346, 350-351, 37 N.Y.S. 751, aff'd. 154 N.Y. 757, 49 N.E. 1098 (cited with approval in Boyarski v. Froccaro, supra 131 A.D.2d at 712-13. In determining the intent of the parties, the court should consider whether there was joint ownership and control of the business and whether there was a sharing of profits and losses. See Ramirez v. Goldberg, supra 82 A.D.2d at 852.

The Court finds that the Debtor husband, together with Olsen and Diamond intended to, and did in fact, create a partnership for the purpose of owning the subject real property. The documentary evidence, including the written partnership agreement and the 1988 partnership tax returns, are unambiguous in that they manifest a partnership agreement and subsequent business conducted pursuant to the agreement. The testimonial evidence offered by the Debtor husband that the partnership was undertaken for its financial advantages further supports the Court's conclusion that a partnership owned the subject property on the date the Debtors filed their petition.

The Court must next determine how ownership of the Debtors' principal residence by the partnership affects the Debtors' ability to claim a homestead exemption in the property.

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formation of the partnership. In re Estate of Havemeyer, 17 N.Y.2d 216, 219, 270 N.Y.S.2d 197, 200 (N.Y. 1966); see Onorato v. Onorato, 133 A.D.2d 617, 618, 519 N.Y.S.2d 726, 727 (N.Y.Sup. Ct. 1987); 43 N.Y.Jur. Partnership ¶65 (1965). The personal property is held by each partner as a tenant in partnership. Partnership Law ¶51(1). It is also clear that the New York homestead

exemption as stated in NYCPLR §5206 generally exempts only "real property", not "personal property", from property of the estate. In re Warren, *supra* 28 B.R. at 292; In re Henry, 38 B.R. 971, 974 (Bankr. E.D.N.Y. 1984); Trust Fed. Sav. & Loan, etc. v. Brown, 78 A.D.2d 119, 123, 434 N.Y.S.2d 306, 310 (N.Y.Sup.Ct. 1980). This interpretation is supported by the plain language of §5206 which expressly applies its exemption only to "real property". The New York Legislature has extended the definition of "real property" to apply to specific types of property that were not previously considered real property such as shares of a cooperative apartment, a condominium or mobile home. See NYCPLR §5206(a)(2),(3),(4). The introductory language to §5206, however, allows only "[p]roperty of one of the following types" to be exempt and conveys the clear intent that the list is exhaustive. Id.

In the instant case the Debtors are attempting to exempt from the estate an interest in partnership real property. Its absence from the list of property found in NYCPLR §5206 infers that the New York Legislature has expressly excluded such an interest from consideration under §5206's definition of real property. Furthermore, NYCPLR §5206 only exempts from the estate property "owned ... as a principal residence." The subject property is not owned as a principal residence by the Debtor Carl Dalmata, but rather as an interest in the partnership property deemed to be personal property by virtue of its character as property of the partnership.

The Court finds that ownership by the partnership of Debtors' principal residence precludes application of the New York homestead exemption for any part of Debtors' interest in the subject property.

c. Conclusion

For the reasons stated above, the Debtors' claimed homestead exemption must be denied and the Court need not consider whether a homestead exemption applies to any fractional interest of the Debtor Carl Dalmata.

II. 1988 Income Tax Refunds

The Trustee conditioned his objection to Debtors' claimed state and federal income tax refund exemption on the Court's allowance of Debtor's homestead exemption so that in the event their principal residence was deemed non-exempt, the Trustee's objection would be withdrawn. The Trustee correctly asserts as the basis for his position, that the use of the homestead exemption precludes the utilization of NYCPLR §283(2) "cash" exemption. Because the Debtors' interest in the two-family dwelling was declared non-exempt, see supra, part I, the Trustee's objection regarding Debtors' state and federal income tax refund in the amount of \$892.00 is deemed withdrawn thereby removing it from the Court's consideration.

III. Pending Personal Injury Claim

The Debtors claim as exempt from the estate pursuant to NYD&CL

¶283, the Debtor husband's "non-economic loss defined in Insurance Law §5102(d)" to be recovered in a pending civil action. The Trustee objects to the exemption asserting that NYD&CL §282(3)(iii) allows as exempt an amount of up to seventy-five hundred dollars and that to the extent that the net amount of the Debtor husband's interest exceeds that amount, it should be property of the estate. He also asserts that the claim itself, as opposed to the proceeds, belongs to the estate and requests that the Court order that the entire file be turned over to him and that the Court appoint an attorney to handle the civil action.

a. Findings of Fact

The Debtor husband has a civil action pending in Oneida County Supreme Court in which he seeks \$150,000.00 plus costs and disbursements from a third party, resulting from an auto accident which occurred on June 7, 1983 (Carl Dalmata v. John McCabe and Sherry Stave, Index # 86-2240, RJI # 22-86-1330). The complaint dated May 1, 1986 alleges that the defendant's negligence caused the Debtor husband "serious personal injuries, lost earnings and medical expenses." The Debtors, up to this point, have asserted control over their right of action, but it remains unliquidated. Thus, the amount and the nature of the proceeds from the suit and, therefore, the amount of the claimed exemption is presently unknown.

b. Discussion

The Court is unable to reach the question of whether the future proceeds of the unliquidated cause of action, if any exist, are

exempted from property of the estate. Because NYD&CL §282(3), the section under which Debtors claim their exemption, defines exemptability by the characteristics of proceeds sought to be exempted, it is inappropriate to apply that section to an unliquidated claim having no present characteristics upon which to base a judgment. Furthermore, to engage in an interpretation of NYD&CL 282(3) may be rendered moot since the possibility exists that the cause of action will be rejected. While the proceeds of Debtors' unliquidated claim are not yet property per se, the question remains whether the pending cause of action being pursued by the Debtor husband is property of the estate pursuant to 11 U.S.C. §541.

The Debtors' claim for "serious physical injuries, lost earnings and medical expenses" is property of the bankrupt estate as of commencement of the case. Under Code §541, all property of the debtor is included in the estate, including exempt property. In re Tignor, 729 F.2d 977, 980-81 (4th Cir. 1984); 4 COLLIER ON BANKRUPTCY §541.10[1],[3] (15th ed. 1989). Exemptions are allowed thereafter. Id. Causes of action belonging to the debtor at the time of the case is commenced fall within the scope of Code §541(a)(1) which provides that the estate includes "all legal or equitable interests of the debtor in property." See id. §541.10[1]; see also Brown v. Dellinger (In re Brown), 734 F.2d 119, 123 (2d Cir. 1984)(interests which are strictly contingent are property of estate); Sierra Switchboard Co. v. Westinghouse Electric Corp., 789 F.2d 706 (9th Cir. 1986)(cause of action is

property of estate if it could not have been reached by creditors under state law).

The Debtor husband's cause of action became property of the estate on the date Debtors filed their petition. Title to the Debtors' cause of action vested in the Trustee at that time. 4 COLLIER ON BANKRUPTCY ¶541.10[1] (15th ed. 1989). Accordingly, the Trustee has the right to either abandon that property or pursue the Debtor husband's cause of action, in which event, he stands in the Debtor husband's shoes regarding defenses to the action raised by the defendant therein. Id. The Trustee may also seek employment of an attorney pursuant to Code ¶327(e) for the purpose of prosecuting the pending civil action.

c. Conclusion

For the foregoing reasons, the Court denies Debtors' claimed exemption regarding Debtor husband's personal injury proceeds and concludes that the cause of action is property of the estate.

Based upon the foregoing, it is

ORDERED that:

1. Trustee's objection to Debtors' Claimed homestead exemption in real property located at 307 Pleasant Street, Utica, New York is granted;
2. Trustee's objection to Debtors' claim that their 1988 Income Tax Refunds are exempt is deemed withdrawn;
3. Trustee's objection to Debtors' claim of non-economic loss in the pending personal injury action is granted;

4. Debtor shall turn over to Trustee within twenty (20) days of the date of entry of this Order their complete file regarding said personal injury claim;

5. The Trustee shall forthwith move pursuant to Code §327(e) and Bankr.R. 2014 for the appointment of special counsel to pursue Debtor husband's personal injury action.

Dated at Utica, New York

this day of November, 1989

STEPHEN D. GERLING
U.S. Bankruptcy Judge