

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

MARK R. GORCZYCA
REBECCA A. GORCZYCA

CASE NO. 91-00015

Debtor

APPEARANCES:

RANDY J. SCHAAL, ESQ.
Trustee
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STEPHEN D. GERLING, U.S. Bankruptcy Judge

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

The Court considers herein the Trustee's Objection to Claimed Exemptions filed pursuant to §522(l) of the Bankruptcy Code (11 U.S.C. §§101-1330) ("Code"), and Rule 4003(b) of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P.").

A hearing on the Trustee's Objection was scheduled for May 28, 1991 and was

York ("District Court Action"), on or about July 23, 1990. The District Court Action was pending at the time the Chapter 7 case was filed and is apparently presently pending in that court.

As indicated in Debtors' Amended Schedule B-4, the District Court Action is predicated upon an alleged violation of Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000(e) et seq.) and seeks "declaratory, injunctive and monetary relief to redress unlawful sex discrimination and retaliation with respect to the plaintiff, Rebecca A. Gorczyca's terms, conditions and privileges of employment." In addition, that action is predicated upon a violation of New York Human Rights Law [N.Y. Executive Law §296 (McKinneys 1982)] seeking damages for sex discrimination, retaliation and intentional infliction of emotional distress. (See paragraph 1 of Complaint filed in District Court Action).

The complaint alleges five separate causes of action and as to four of five causes of action R. Gorczyca seeks an order, inter alia, requiring the defendants to provide "adequate back pay to compensate her for her lost salary, wages, commissions, fringe benefits and employment opportunities." (See "Wherefore" clause of Complaint filed in District Court Action).

R. Gorczyca's third, fourth and fifth causes of action also seek compensatory and punitive damages totalling one million dollars.

ARGUMENTS

The Trustee contends that R. Gorczyca's District Court Action is not exempt in accordance with §282 of the New York Debtor and Creditor Law ("NYD&CL") because subsection (3)(iii) of that section exempts a maximum of \$7,5000 "on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss of the debtor or an individual

of whom the debtor is a dependent;".

The Trustee argues very simply that §282 of NYD&CL is not intended to exempt all personal injury claims up to \$7,500, but only those which arise out of personal "bodily" injury and that since the claims of R. Gorczyca asserted in the District Court Action are for unlawful sexual discrimination and intentional infliction of emotional duress, they do not fall within the purview of §282 of NYD&CL.

Debtors argue that the claims asserted in the District Court Action are within the definition of personal injury under applicable New York State law, as well as federal law, citing to the Internal Revenue Code and arguing that §282(3)(iii) of NYD&CL should not be read so as to require the injury to be of a physical nature.

Debtor R. Gorczyca also asserts that she is entitled to exempt any loss of future earnings she may be able to prove in the District Court Action pursuant §282(3)(iv) of the NYD&CL. The Trustee does not appear to specifically oppose the exemptability of R. Gorczyca's claim for loss of future earnings, though he does assert her entire claim belongs to the bankruptcy estate.

DISCUSSION

Prior to September 1, 1982, exemptions allowed in Title II cases filed in bankruptcy courts located within New York State were governed by Code §522(d), however, on that date New York "opted out" of the federal exemption scheme and enacted Article 10-A of the NYD&CL

entitled "Personal Bankruptcy Exemptions".

There is no dispute that §282(3) applies to the instant contested matter or that §282(3)(iii) and (iv) parrot Code §522(d)(11)(D) and (E). Thus, consideration of the issues presently before the Court need not be restricted to cases which focus solely upon §282(3) of the NYD&CL.

The Debtors initially cite the case of In re Sheets, 69 B.R. 542 (Bankr. W.D.N.Y. 1987) in support of their contention that personal injury actions are exempt from inclusion in the debtor's estate, pursuant to Code §541. While this Court does not dispute the conclusion reached by the Bankruptcy Court in In re Sheets, supra, it respectfully disagrees with that Court's view of the issues as being controlled by §541 in light of the plain language of Code §522(d)(11)(D).¹

The oft cited Legislative History of Code §522(d)(11)(D) found in H.Rep. No. 95-595 accompanying H.R. 8200, 95th Cong. 1st Sess. (1977) reads as follows: "This provision in subparagraph (D)(11) is designed to cover payments in compensation of actual bodily injury, such as the loss of a limb, and is not intended to include the attendant costs that accompany such loss, such as medical payments, pain and suffering or loss of earnings."

The Debtors, however, cite several cases which they contend reject the conclusion one may logically draw from the Legislative History and embrace one that allows the term "bodily" to be read out of the statute leaving behind the phrase "personal injury".

Cases such as In re Sidebotham, 77 B.R. 504 (Bankr. E.D.Pa. 1987); In re Territo, 36 B.R. 667 (Bankr. E.D.N.Y. 1984); In re Lynn, 13 B.R. 361 (Bankr. W.D.Wisc. 1981), cited by Debtors, do not, however, deal with an interpretation of the phrase "personal bodily injury" but deal instead

¹ It is observed that the Sheets court specifically noted that since that case had been commenced prior to September 1, 1982, Article 10-A of the NYD&CL did not apply.

with the scope of the exemption relating to a claim for personal bodily injury.

Debtors do cite one case which would appear to support their contention that "personal bodily injury" does not require actual physical injury to a body part. The bankruptcy court in Matter of Young, 93 B.R. 590 (Bankr. S.D.Ohio 1988) concluded that a wife's "loss of consortium arising out of personal bodily injuries suffered by her husband, did constitute "personal bodily injury." However, a close reading of that case indicates that the decision is grounded on Ohio case law and the wife's loss of consortium was a claim derived from the husband's actual bodily injury and would not have existed but for the bodily injury to the debtor husband. Thus, Matter of Young, supra is factually dissimilar from the instant case.

While there is a dearth of cases directly on point, there are several cases which discuss the concept of personal bodily injury or personal injury, though it may be argued that they do so only in dicta.

The first case is In re Babcock, 44 B.R. 521 (Bankr. Minn. 1984) where the bankruptcy court, in interpreting the exemption statutes of the State of Minnesota utilizing the phrase "injuries to the person of the debtor or a relative whether or not resulting in death", concluded that that language could not be utilized to exempt a cause of action for conversion since the court concluded "that the legislature envisioned actual bodily injury, such as a cut, bruise or broken limb, as distinguished from an injury to a person's property." Id. at pg. 522.

In Niedermayer v. Adelman, 90 B.R. 146 (D.Md. 1988), a district court interpreting the Maryland exemption statute which utilized the phrase "injury of the person" observed:

Mental anguish, damage to reputation and damages caused by false imprisonment and malicious prosecution are therefore equally injury to the person. Had the Maryland legislature intended to limit the exemption to claims for bodily or physical injury, it would have so limited the provisions. In contrast to the Maryland statute, the federal exemption, which is not here applicable, does in fact limit its exemption

to bodily injury. See 11 U.S.C. §522(d)(11)(D).

In re Haaland, 89 B.R. 845 (Bankr. S.D.Cal. 1988) is a bankruptcy court decision in which the debtor sought to exempt a legal malpractice claim against his former attorney. The bankruptcy court, interpreting a California exemption statute utilizing the term "personal injury", concluded that term "bodily" had to be read into the statute and that its omission from the exemption statute was an oversight rather than an expression of legislative intent. Thus, the court concluded "[t]hat the California legislature did not intend for §704.140 to include injuries which were not of a physical nature."

Finally, in In re Vinci, 108 B.R. 439 (Bankr. S.D.N.Y. 1989), in which the bankruptcy court concluded, in the context of 28 U.S.C. §157(b)(5), that the phrase "personal injury tort" was restricted to torts involving "trauma or bodily injury". Bankruptcy Judge Howard Schwartzberg noted that "[i]t has been observed that Congress knew how to be restrictive in the choice of language concerning personal injury torts when dealing with exemptions as in 11 U.S.C. §522(d)(11)(D) when it allowed a debtor an exemption up to \$7,500.00 'on account of personal bodily injury' ..." Id. at pg. 442. See also In re Cohen, 107 B.R. 453.²

It is clear from a reading of these cases that were the precise issue before those courts whether or not a claim for sexual harassment constituted bodily injury, they would have answered in the negative. This Court must too respond in the negative based upon its interpretation of §282(3)(iii) of NYD&CL.

Turning to the second issue, there appears to be an inconsistency. Debtors' affidavit

² The Court points out that In re Vinci, supra, is at odds with the two decisions of this Court interpreting 28 U.S.C. §157(b)(2)(O) and (b)(5). See In re Smith, 95 B.R. 286 (Bankr. N.D.N.Y. 1988); In re Boyer, 93 B.R. 313 (Bankr. N.D.N.Y. 1988) for reasons not relevant here.

in opposition to Notice of Hearing filed June 19, 1991 contends that §282(3)(iv) of NYD&CL exempts from Debtors' estate any claim to "payment in compensation of loss of future earnings of the Debtor." While that reading of §282(3)(iv) of NYD&CL is correct, a review of R. Gorczyca's Complaint indicates that she seeks to recover only back pay, together with compensatory and punitive damages.

Clearly, the exemption found in §282(3)(iv) of NYD&CL is inapplicable to back pay, compensatory and punitive damages, and courts have narrowly construed Code §522(d)(1)(E) which is the identical provision. See In re Cramer, 30 B.R. 193 (Bankr. E.D.Pa. 1991).

A review of Debtors' Schedule B-4, however, reveals that they claimed an exemption for "Loss of Fut. Earnings" and thus, insofar as they are able to recover that loss in the District Court Action, Debtors are entitled to exempt that amount pursuant to §282(3)(iv) of NYD&CL.

Based upon the foregoing, it is

ORDERED that the Trustee's Objection seeking to deny exempt status to the proceeds of the District Court Action referred to in Debtors' Schedule B-4 is granted, except to the extent that recovery is had for payment in compensation of loss of future earnings of the Debtor R. Gorczyca or an individual of whom the Debtor R. Gorczyca is or was a dependent to the extent reasonably necessary for the support of the Debtor and any dependent of the Debtor R. Gorczyca, and it is further

ORDERED that the issues of reasonable necessity and dependent status as required by §282(3)(iv) of NYD&CL shall be determined upon further notice and hearing before this Court in the event Debtors recover loss of future earnings in the District Court Action.

Dated at Utica, New York

this day of October 1991

STEPHEN D. GERLING
U.S. Bankruptcy Judge