UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

DAVID N. LEVITT . CASE NO. 98-66479

Debtor

IN RE:

BERNARD A. LEVITT CASE NO. 98-66480

Debtor

APPEARANCES:

RANDY J. SCHAAL, ESQ.
Attorney for Trustee
Estate of David N. Levitt
100 W. Seneca Street
Sherrill, New York 13461

CAROLYN COOLEY, ESQ.
Attorney for Trustee
Estate of Bernard A. Levitt
Mayro Building, Room 405
Utica, New York 13501

RICHARD WOLFE, ESQ.
Attorney for Debtors
2803 Genesee St.
Utica, New York 13501

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

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

Presently before the Court are motions filed by Randy J. Schaal, Esq. ("Schaal"), the chapter 7 trustee in the case of David N. Levitt ("D. Levitt"), and Carolyn J. Cooley, Esq.

("Cooley"), the chapter 7 trustee in the case of Bernard Andrew Levitt.[1] The two Trustees seek turnover of what is described by them as "the non-exempt asset known as severance pay." *See* Schaal's Motion, filed December 16, 1998, and Cooley's Motion, filed January 21, 1999. D. Levitt and A. Levitt (the "Debtors") are brothers and at one time prior to filing their bankruptcy petitions were co-owners of Levitts' Commercial Containers, Inc. ("Levitt Corporation"). Both Debtors are represented by Richard L. Wolfe, Esq.

Schaal's motion was initially heard at the Court's regular motion term in Utica, New York, on January 26, 1999. The motion was adjourned until February 23, 1999, at which time argument on Cooley's motion was also heard. The Court afforded the parties an opportunity to file memoranda of law, and both motions were submitted for decision on March 19, 1999.[2]

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of these contested matters pursuant to 28 U.S.C. §§ 1334(b), 157(a), (b)(1) and (b)(2)(E).

---

[1] According to the Debtor's petition, he is known also as B. Andrew Levitt and Andrew Levitt. Because the documents/contracts filed with the Court in connection with these motions identify him as "Andrew Levitt," the Court will refer to him as "A. Levitt" for purposes of this decision.

[2] Because of the overlapping issues of fact and law, the Court deems it appropriate to consolidate both motions for the limited purpose of issuing this decision.

FACTS

On October 8, 1998, the Debtors filed their Petitions pursuant to chapter 7 of the Bankruptcy Code (11 U.S.C. §§ 101-1330) ("Code"). According to each of the Debtors' Statement of Financial Affairs, they began operating a waste hauling business in 1985. Allegedly, in 1996 Levitt Corporation merged with another company to form Oneida-Herkimer Waste Haulers, LLC ("Waste Haulers"). *See* Debtors' Memorandum of Law, filed February 22, 1999. On or about October 1, 1996, the Debtors entered into employment agreements with Waste Haulers for a term of one year at salaries of $52,000. *See* Exhibit "A" of Debtors' Memorandum of Law at ¶ 4.1.

On or about April 14, 1997, the Debtors entered into an Asset Purchase Agreement ("APA") with BBC, a New York limited liability company with its principal office in Potsdam, New York, for the sale of the assets of the Debtors.[3] Under the terms of the APA, BBC agreed to purchase the assets of the Debtors and Levitt Corporation, including their interests in certain leases, provided that the Debtors agreed not to compete with BBC. In exchange for a covenant not to compete, BBC agreed to pay the Debtors $120,000.[4] *See* Exhibit "B" of Debtors' Memorandum of Law at 2 and ¶ 13.2.

As part of the APA, the rights and obligations of Waste Haulers in connection with its employment of the Debtors were assigned to and assumed by BBC. *See id.* at ¶ 2.3. The

---

[3] According to the APA, at that time Levitt Corporation still existed as a separate corporate entity which leased certain personal property to Waste Haulers. *See* Exhibit "B" of Debtors' Memorandum of Law.

[4] This appears to have been in addition to the purchase price of $365,000.

Debtors' term of employment was originally extended for a period of a year, commencing on the closing date of the APA. The APA was amended ("Modified APA") on or about July 28, 1997, and provides that their term of employment was to extend to July 21, 1998. *See* Exhibit "C" attached to Debtors' Memorandum of Law at ¶ 2.3.1. Pursuant to the Modified APA, A. Levitt's compensation was increased from $52,000 to $84,300, and D. Levitt's was reduced from $52,000 to $49,500. *See id.* at ¶ 2.3.4.1 and 2.3.4.2. Under the terms of the Modified APA, if either of the Debtors was terminated with or without cause within that year of employment, provision was made for them to receive "severance pay," the amount of which was based on when during the year the termination occurred. *See id.* at ¶ 2.3.5 and 2.3.6. Payments were to be made over three years in monthly installments. For example, if within the first three months of employment with BBC, D. Levitt was terminated, his "severance pay" was to be $49,500, payable over three years. If, on the other hand, he was terminated during the seventh to ninth month, his "severance pay" was to be $23,500, payable over three years. According to the Debtors' Petitions, D. Levitt and A. Levitt were each to receive $1,000 per month until November 1, 2000 ("Payments").[5] *See* Schedule I of the Petitions. The Debtors did not claim the Payments as exempt.[6] *See* Schedule C of the Petitions

[5] The Court notes that under the terms of the Modified APA, one would expect payments to A. Levitt to be higher than those being made to D. Levitt based on the difference in their annual salaries and the terms set forth in the Modified APA.

[6] Pursuant to Rule 1009 of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P."), a debtor may amend his list of exemptions "as a matter of course at any time before the case is closed." *In re Carson*, 82 B.R. 847, 857 (Bankr. S.D.Ohio 1987).

ARGUMENTS

It is the Trustees' position that the Payments are property of the estate and should be turned over to them because there is no basis for the Debtors to claim them as exempt. Both Trustees argue that the Payments were negotiated in connection with the buyout under the terms of the APA and represent consideration for the purchase of the assets of the Debtors and Levitt Corporation.

The Debtors contend that by virtue of the covenant not to compete they are getting paid to perform a service, namely, refraining from working in the field of waste management, and that such payments represent earnings that are "exempt."[7] In the alternative, the Debtors argue that pursuant to § 282(3)(iv) of New York Debtor & Creditor Law ("NYD&CL"), the Payments represent compensation for the loss of future earnings and that the Payments are reasonably necessary for the support of the individual Debtors and their dependents. Citing to *Carson*, the Debtors contend that the loss of earnings need not be the result of personal bodily injury. The Debtors assert that payments intended to compensate for the loss of earnings attributable to any type of wrong, whether based on, for example, a breach of contract, or termination of ones employment, are also exempt.

---

[7] Although Debtors' counsel uses the word "exempt" in making this particular argument, the Court believes that what the Debtors are actually contending is that the Payments are not property of the estate. This conclusion finds support in the fact that the Debtor did not identify the Payments as assets and claimed no exemption in them. In addition, the Debtors, in stating their position, rely on *In re Ryerson*, 30 B.R. 541 (9th Cir. BAP 1983), *aff'd* 739 F.2d 1423 (9th Cir. 1984), which dealt with the question of whether severance pay, which the debtor became entitled to claim some eight months after he filed his petition, was property of the estate pursuant to Code § 541(a).

DISCUSSION

According to the express terms of the APA, the Debtors received $120,000 at the time of the closing on the sale of the business in consideration for their promise not to compete with BBC. This payment is to be distinguished from the monthly sum of $1,000 each is receiving since being terminated by BBC. Yet, it appears that Debtors' counsel takes the position that in addition to the lump sum payment of $120,000, the payments of $1,000 per month also constitute consideration for the Debtors' agreement not to compete. The Debtors contend that the Payments replace future earnings to which they would have otherwise been entitled if they had not agreed to abstain from any form of work that would compete with BBC's business.

In a case factually similar to that now before this Court, the issue of whether payments pursuant to a non-compete agreement qualified as "earnings from services performed" under Code § 541(a)(6) was addressed by the Court of Appeals for the Fourth Circuit in *Andrews v. The Riggs Nat'l Bank of Washington, D.C. (In re Andrews)*, 80 F.3d 906 (4th Cir. 1996). The court in *Andrews* found that "the post-petition noncompetition payments are not part of the debtor's fresh start efforts, but rather payments that are rooted in the debtor's prepetition conduct. As such, these are payments that § 541(a)(6) contemplates should be included in the bankruptcy estate." *Id.* at 911; *see also In re Schneeweiss*, Case No. 96-62378, slip op. at 6 (Bankr. N.D.N.Y. February 6, 1998) (concluding that "payments received in consideration of not competing do not constitute 'earnings from services performed.'" and are property of the estate). Accordingly, the Court finds no merit to the Debtors' argument that the Payments represent earnings from services performed in not competing with BBC and, therefore, are not property of

the estate.

The question then arises whether the Debtors are entitled to exempt the Payments under the theory that they are intended to compensate them for a loss of earnings following their termination by BBC because of their agreement not to seek employment in the field of waste management. The Debtors base their claim on NYD&CL § 282(3)(iv), which entitles a debtor to exempt an interest in "a payment in compensation of loss of future earnings of the debtor . . . ."

In support of their position, the Debtors rely on language found in *Carson*:

> Finally, as a matter of policy, the Court believes that the interpretation of the earnings exemption advocated by the Trustee is unduly restrictive. The Court can conceive of no societal interest which would be served by permitting a Debtor to exempt compensation for lost future earnings caused by bodily injury but denying the benefit of the exemption to other Debtors whose loss of earnings results from a wrongful act that does not inflict actual harm to their persons (e.g., retaliatory discharge, breach of contract, etc.).

Carson, 82 B.R. at 856. The Debtors contend that "[i]f there is no distinction between a loss of earnings caused by bodily injury and a loss caused by a breach of contract, then a loss caused as a result of the termination of a contract would seem to fall into the same category, and compensation for it (severance pay) should be exempt on that same basis." *See* Debtors' Memorandum of Law at 4-5.

The Court need not decide whether NYD&CL § 282(3)(iv) is applicable only to the loss of future earnings caused as a result of bodily injury as found in *In re Phillips*, 45 B.R. 529 (Bankr. N.D. Ohio 1984) and *In re Simon*, 71 B.R. 65 (Bankr. N.D. Ohio 1987), cases distinguished by the court in *Carson*. Even if the Court were to agree with the court in *Carson*

that the exemption should also include payment for the loss of earnings attributable to a "wrongful act" which does not inflict actual harm on a debtor's person, there is still no remedy available for the Debtors herein. There has been no evidence of a "wrongful act" for which they are receiving compensation. They entered in a consensual agreement with BBC in connection with the sale of the assets of Levitt Corporation. Under the terms of the APA, their employment could be terminated with or without cause by BBC. The Debtors agreed that if that occurred anytime within the year ending July 21, 1998, they would receive the unpaid balance of their salaries, as computed on a quarterly basis, in monthly payments over a three year period. Based on the facts presented, the Debtors were not wrongfully discharged from their positions with BBC as was the case in *In re Forbes*, 58 B.R. 706 (Bankr. S.D. Fla. 1986), a case cited in *Carson;* nor have there been any allegations that BBC was guilty of employment discrimination or retaliatory discharge of the Debtors for which they sought compensation, as was alleged in *Carson*. Under these circumstances, the Court must conclude that NYD&CL § 282(3) does not provide a legal basis for granting an exemption to the Debtors with respect to the monthly payments they are receiving of $1,000 until November 1, 2000. Accordingly, the Court will grant the Trustees' motions seeking turnover of the Payments."

Based on the foregoing, it is hereby

ORDERED that D. Levitt turnover to Schaal the Payments he has received since filing his chapter 7 petition on October 8, 1998 and will receive until November 1, 2000; and it is finally

ORDERED that A. Levitt turnover to Cooley the Payments he has received since filing his chapter 7 petition on October 8, 1998, and will receive until November 1, 2000.

Dated at Utica, New York

this 16th day of April 1999

_____

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge