UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

In re	)	
	)	
JOHN A. ASUNMAA,	)	Case No. 6:09-bk-07428-KSJ
SUSAN MARIE ASUNMAA,	)	Chapter 7
	)	
Debtors.	)	
	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON TRUSTEE'S OBJECTION TO DEBTORS' AMENDED CLAIM OF EXEMPTIONS

The Chapter 7 trustee, Emerson Noble, objects to the debtors' exemption of $20,000 they deposited into a Roth IRA account ten days before they filed bankruptcy.[1] The debtors assert that the funds are exempt under Section 222.21(3) of the Florida Statutes, which normally exempts funds in protected IRA accounts, or, alternatively, pursuant to a unique federal statute, that protects distributions received from Mr. Asunmaa's employer, Northwest Airlines. The trustee responds arguing that the funds the debtors used to open the Roth IRA came from a federal tax refund, were not exempt, and, given the timing and surrounding circumstances, that the debtors opened the IRA account with the intent to defraud their creditors. So, the trustee relies on §222.30 of the Florida Statutes and argues that the debtors fraudulently converted the $20,000 by opening the Roth IRA and are not entitled to the exemption. The Court agrees and sustains the trustee's objection.[2]

[1] On January 12, 2010, the Court held a hearing on the Trustee's Objection to the Debtors' Amended Claim of Exemptions (Doc. No. 64) and the Opposition by Debtors to Trustee's Objection to Debtors' Claim of Exemption (Doc. No. 78).

[2] The trustee also raised two other objections: (1) an objection regarding the debtors' two cars brought pursuant to Florida Statute 222.25(1); and (2) an objection to the "wildcard" exemption under Section 222.25(4) of the Florida Statutes. The trustee withdrew his prior objection to the debtors' cars at the hearing.

As to the trustee's objection to the wildcard exemption brought pursuant to Section 222.25(4), the Court will abate consideration of this objection pending resolution of a virtually identical issue by the Florida Supreme Court in the case of *Osborne v. Dumoulin (In re Dumoulin)*, No. 08-15355, 2009 WL 1090334 (Fla. April 23, 2009). Because resolution of the issue appears imminent, this Court will await the decision of the higher court providing much needed guidance on this controversial statute before deciding the trustee's remaining objection. Upon entry of the ruling and, if desired, the parties will have an additional 30 days to file any supplemental memorandums of law to clarify or argue any matters relevant to the specific facts of this case based upon the ruling of the Florida Supreme Court.

Mr. Asunmaa has worked as a commercial airline pilot for Northwest Airlines Corporation for over twenty years. When Northwest filed its Chapter 11 case in 2005, the company stopped contributing to Northwest employees' defined benefit retirement plans, including Mr. Asunmaa's retirement plan. Northwest successfully reorganized its business and emerged from its Chapter 11 case in 2007. One portion of Northwest's confirmed reorganization plan required the company to give its employees, including Mr. Asunmaa, stock in the reorganized business to compensate employees for lost retirement plan contributions.

On December 23, 2008, the United States Congress enacted legislation allowing Northwest employees to contribute these stock distributions to a Roth IRA, treating the transfers as qualified rollover contributions (the "Airline Exemption"). Publ. L. 110-458, Title I, Section 125, 122 Stat. 5115 (2008). So, the Airline Exemption allowed Northwest employees, like Mr. Asunmaa, to receive stock distributions from Northwest and, *if* the funds were used to open a protected Roth IRA, the transfer was treated as a qualified rollover contribution protected from claims of the employee's creditors.

Mr. Asunmaa, however, never used the funds from his stock distribution to open a Roth IRA. In 2007, Mr. Asunmaa received his stock from Northwest, valued at $75,998.24 (Debtors' Ex. No. 3; Trustee's Ex. No. 5). He sold the stock and used the money to pay various debts and living expenses.

Mr. Asunmaa did not open a Roth IRA until ten days before this bankruptcy case[3] was filed. None of the funds placed into the Roth IRA came from Northwest's stock distribution. On April 29, 2009, the debtors received a 2008 federal tax refund of $31,751, which they promptly deposited into a SunTrust checking account. The next day, on April 30, 2009, the debtors used $10,000 from this account to pay their bankruptcy lawyer his fee (Trustee's Ex. No. 4). On May

[3] The case originally was filed as a Chapter 11 reorganization case but was converted to a Chapter 7 liquidation case on July 24, 2009.

19, 2009, the debtors used $20,000 from the checking account to open a Roth IRA. On May 29, 2009, they filed this bankruptcy case.

The debtors claim in their Amended Schedule C that the $20,000 Roth IRA is exempt from claims of creditors under Florida Statute Section 222.21(2). All parties agree that Roth IRA's typically are protected accounts. Here, the trustee objects arguing that the Roth IRA was funded by a transfer of non-exempt assets (the federal tax refund) to exempt assets (the Roth IRA) shortly before the bankruptcy was filed and is a fraudulent conversion under Florida Statute Section 222.30. The debtors in response argue that no fraudulent conversion occurred because the funds used to open the Roth IRA already were exempt under the Airline Exemption. Because the funds already were exempt, they argue that their creditors were not harmed when they opened the Roth IRA.

The objecting party, here the trustee, has the burden of proving that the debtors' claimed exemptions are proper. Fed. R. Bankr. P. 4003(c). Because Florida has opted out of the Bankruptcy Code's exemption scheme through provisions of the Florida Constitution and the Florida Statutes, Florida state exemption law controls. *See In re Barker*, 168 B.R. 773, 775 (Bankr. M.D. Fla. 1994). The trustee, relying on Florida Statute Section 222.30, contends that the debtors are not entitled to protect the normally exempt Roth IRA because the opening of the account was a fraudulent conversion. The Florida statute defines a fraudulent conversion broadly making every conversion of non-exempt to exempt assets fraudulent "if the debtor made the conversion with the intent to hinder, delay, or defraud the creditor." Fla. Stat. Section 222.30(2).

The issue then is whether the funds used to open the Roth IRA already were exempt under the Airline Exemption. If yes, then no fraudulent conversion occurred. If no, then the Court must analyze whether the trustee has met his burden to show that the debtors acted with the intent to hinder, delay, or defraud their creditors when they opened the Roth IRA.

The Court rejects the debtors' argument that the Airline Exemption applies to the funds they used to open the Roth IRA. Federal tax refunds are not exempt under Florida law. *In re Sanderson*, 382 B.R. 595, 597 (Bankr. M.D. Fla. 2002). In *Sanderson*, the debtor tried to exempt a federal income tax refund claiming they were "earnings" under Section 222.11 of the Florida Statutes. In rejecting this attempt, the court reasoned "courts uniformly held that tax refund claims were not wages but a chose of action, and the fact that the refund claim was based on excessive withholding from the wages of the debtor during the tax year in question was of no significance." *Id*. at 597.

Likewise, the debtors' assertion that their tax refund constitutes excessive withholding from the Northwest stock distribution is specious. The debtors received the Northwest stock in 2007. They sold the stock and used the funds to pay their bills. In 2009, the debtors received a generous tax refund of over $31,000. The debtors failed to introduce their 2008 federal tax return or otherwise explain the basis for the refund; however, the Court would find that the refund certainly has no direct connection to the stock they sold.

As explained on IRS Form 8935, the debtors necessarily needed to deposit the Northwest stock into a Roth IRA in order to take advantage of the Airline Exemption. The debtors did not do as instructed and cannot now contend that their 2008 tax refund somehow is covered by the Airline Exemption. The tax refund is not entitled to any exemption.

Any possible argument that the tax refund is subject to any vestige of protection by the Airline Exemption is further defeated by the fact that the debtors first deposited the tax refund into their SunTrust checking account, another non-exempt asset. So, the clear conclusion is that the debtors used non-exempt funds, either the tax refund or funds held in a checking account, to open the Roth IRA ten days before filing bankruptcy and only after getting legal advice from their bankruptcy lawyer.

The issue then is whether the debtors' actions in opening the Roth IRA were taken with the intent to hinder, delay or defraud their creditors. "The party objecting to the exemption must prove by a preponderance of the evidence that the debtor harbored the requisite intent…, which may be inferred from extrinsic evidence." *In re Simms*, 243 B.R. 156, 159 (Bankr. S.D. Fla. 2000). The debtors' subjective intent is not relevant. *See Barker*, 168 B.R. at 780. Because parties rarely directly testify that they acted with a fraudulent intent, courts generally rely on the "badges of fraud" to determine the debtors' intent. *Id*. at 779; *see also In re Jennings*, 332 B.R. 465, 469 (Bankr. M.D. Fla. 2005). Key badges of fraud include whether the transfer was to an insider, whether the debtor retained possession or control over the transferred property, whether the transfer occurred after the debtor was sued or threatened with suit, whether the debtor was insolvent or became insolvent shortly after the transfer was made, and whether the debtor concealed the transfer. Fla. Stat. Section 726.105(2). "Two important indicators of fraudulent intent are the timing of the conversion from non-exempt to exempt property and any attempts by [the] debtor to conceal the conversion." *In re Mackey*, 158 B.R. 509, 512 (Bankr. M.D. Fla. 1993); *see also In re Tabone*, 247 B.R. 541, 545 (Bankr. M.D. Fla. 2000).

The trustee relies on the undisputed facts to establish the debtors' fraudulent intent. The debtors opened the Roth IRA only ten days prior to filing bankruptcy. They acted after consultation with a bankruptcy lawyer. The transfer was to the debtors—clearly a transfer to an insider. The debtors retained possession and control over the Roth IRA. The debtors' original schedules reflect that they were insolvent by approximately $300,000 on the day they filed this bankruptcy case (Doc. No. 23). Their response to Question 4 on their Statement of Financial Affairs indicates that they were involved in at least three pending foreclosure actions on the filing date. As such, the transfer of non-exempt to exempt funds to open the Roth IRA was made at a time the debtors were involved in litigation with their creditors and were insolvent. The debtors also concealed the creation of the Roth IRA by failing to list the transfer in response to

Question 10 on their Statement of Financial Affairs. The trustee has introduced more than sufficient proof to establish that the debtors opened their Roth IRA on the eve of bankruptcy with the sole purpose to keep it from their creditors and with the intent to hinder or delay their creditors' access to the funds.

In *Barker*, the bankruptcy court found fraudulent intent where the debtors failed to record on their schedules and statement of financial affairs a transfer of non-exempt stock proceeds into an exempt annuity reasoning that the debtors "gambled that creditors would not inquire into the *timing* of the transfer or desire to file a separate action to recover the monies—which would entitle [the debtor] to retain the annuity." 168 B.R. at 780. In that case, the debtors purchased an annuity in the amount of $14,007 just five days prior to filing a petition for relief under chapter 7. Although the bankruptcy court found the debtors were open and candid with the Chapter 7 trustee and certain creditors regarding the annuity purchase, the court nonetheless determined the debtors formed the requisite intent to "hinder, delay, or defraud" their creditors because they failed to record the purchase on their schedules. *Id*.

The Court similarly concludes that the debtors here fraudulently converted the funds used in opening the Roth IRA thereby defeating the debtors' claim of exemption. The debtors offered no testimony to otherwise explain their conduct or refute the trustee's allegation of their fraudulent intent. The Court will sustain the portion of the trustee's objection made under Section 222.30 as to all funds deposited into the Roth IRA and reserve ruling on the debtors' entitlement to the use of the "wildcard" exemption under Section 222.25(4) until after the Florida

Supreme Court rules in the *Dumoulin* decision. A separate order consistent with these Findings of Fact and Conclusions of Law shall be entered.

DONE AND ORDERED in Orlando, Florida, on March 31, 2010.

/s/ Karen S. Jennemann

KAREN S. JENNEMANN
United States Bankruptcy Judge

Copies provided to:

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