

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

In re:

Case No. 9:11-bk-08334-FMD
Chapter 7

Margaret K. Ashley,

Debtor.

**ORDER SETTING FINAL EVIDENTIARY
HEARING ON TRUSTEE'S MOTION FOR
TURNOVER AND OBJECTION TO DEBTOR'S
CLAIM OF EXEMPTION
(Doc. Nos. 76 and 83)**

THIS CASE initially came on for hearing on September 27, 2012, on the Chapter 7 Trustee's *Motion for Turnover* (Doc. No. 76) and the *Debtor's Response to Trustee's Motion for Turnover* (Doc. No. 79). The Chapter 7 Trustee (the "Trustee") seeks turnover of several of the Debtor's non-exempt assets, including the entire balance of approximately \$21,000.00 in the Debtor's Invest Financial account (the "Account").

The Debtor's bankruptcy case was initially filed under Chapter 7 on April 29, 2011, and it was converted to Chapter 13 on July 7, 2011. On April 3, 2012, the Debtor's case was re-converted to Chapter 7. The Debtor contends that while her bankruptcy case was pending under Chapter 13, she was required to spend most of the funds in the Account to pay for unexpected medical expenses for herself and for family members. The Debtor states that she now has approximately \$2,000.00 available to turn over to the Trustee in proposed satisfaction of her exemption overage.

On September 27, 2012, the Debtor filed an amended Schedule C (Doc. No. 82), claiming \$3,520.00 of the Account funds as exempt. On the following day, the Trustee filed her *Objection to Debtor's Amended Claim of Exemption* (Doc. No. 83) (the "Objection"). The Objection is based upon the fact that the Debtor failed to disclose the Account in her initial Chapter 7 bankruptcy schedules, and that the newly claimed exemption should be disallowed, as having been claimed in bad faith only after the Trustee discovered the Account's existence. The Debtor filed a response to the Objection (Doc. No. 85), again offering to pay \$2,000.00 to the Trustee.

The Objection came on for hearing on November 15, 2012. At that hearing, the parties agreed that the issues in the Motion for Turnover and the Objection are the same. The Trustee cites *In re Fatsis*, 396 B.R. 579 (Bankr. D. Mass. 2008) in support of her position that the Debtor, having spent the Account funds after she converted her case from a Chapter 13 to a Chapter 7, should be required to turn over the initial pre-conversion balance of the Account. In *Fatsis*, the court held that a Chapter 13 debtor does not have the right to use estate property in the ordinary course of living during the pendency of the debtor's Chapter 13 case. *Fatsis*, however, represents a minority position. The majority of courts hold that Chapter 13 debtors have at least an implied right to use estate property for lawful purposes during the pendency of their cases, including for the payment of ordinary and necessary living expenses, provided that such use occurs in good faith. See, e.g., *In re Laflamme*, 397 B.R. 194 (Bankr. D. N.H. 2008). The Court agrees with the majority, and holds that a Chapter 13 debtor has the right to use estate property for lawful purposes, including the funding of ongoing living expenses, so long as such use occurs in good faith.

Although the Debtor asserts that she spent the majority of the funds in the Account on necessary medical expenses for herself and her two daughters, the Court is unable to make a proper evidentiary determination that the Debtor made such expenditures in good faith. See, e.g., *In re Grein*, 435 B.R. 695, 705 (Bankr. D. Colo. 2010) (good faith inquiry requires an evidentiary hearing). Therefore, the Court will set the Motion for Turnover (Doc. No. 76) and the Objection (Doc. No. 83) for final evidentiary hearing on the issues of: (i) the amount of the expenditures of the Account funds that occurred during the Debtor's Chapter 13 case; (ii) the purpose of those expenditures; (iii) whether the Debtor's expenditures of the Account funds were made in good faith; and (iv) whether the Debtor's alleged failure to disclose the Account precludes her ability to claim a portion of the Account as exempt.

If the Court finds that the Debtor is entitled to the exemption and that the expenditures were made in good faith, the amount that the Debtor is required to turn over to the Trustee is governed by 11 U.S.C. § 348(f)(1)(A), which requires a debtor, upon the conversion of a case from Chapter 13 to Chapter 7, to turn over property of the estate as of the date of the petition that remains in the debtor's control or possession on the date of conversion.

Accordingly, it is

ORDERED that the Court will, by separate order, schedule a final evidentiary hearing, consistent with the foregoing analysis.

DONE and ORDERED in Chambers at Tampa, Florida, on January 28, 2013.

/s/
Caryl E. Delano
United States Bankruptcy Judge