

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

In re:

CASE NO: 05-14195-3P7

KEITH E. PEREAU

Debtor.

_____ /

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

This Case is before the Court upon the Chapter 7 Trustee's Objection to Debtor's Claim of Exemptions. After hearings held on October 25, 2006 and November 29, 2006, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. On October 14, 2005, Keith E. Pereau ("Debtor") filed a petition under Chapter 7 of the Bankruptcy Code.

2. Debtor and Lydia Pereau were husband and wife at all relevant times. Debtor's wife did not file separately or join in his petition.

3. Debtor's schedules and statement of financial affairs, filed on October 14, 2005, list \$0.00 in non-exempt assets and \$546,300.93 in unsecured debt, no lawsuit or possible cause of action was disclosed. (Trustee's Ex. 2).

4. At the § 341 Meeting of Creditors, held on November 28, 2005, Debtor advised the Trustee that he had retained attorney Borden Hallowes to pursue a personal injury claim on his behalf. (Debtor's Ex. 11, p. 7-8). The cause of action was undisclosed on Debtor's schedules, until Debtor amended his schedules on January 30, 2006.

5. Borden Hallowes settled Debtor's personal injury claim against Nimnicht Chevrolet without consulting the Chapter 7 Trustee. On February 7, 2007, Debtor and his non-filing spouse executed a general release of all claims against Nimnicht in exchange for a settlement check in the amount of \$35,000. (Debtor's Ex. 2).

5. The settlement check was made out to Borden Hallowes, Attorney and Keith Pereau and Lydia

Pereau. (Trustee's Ex. 7). Although the check was not pro-rated between Debtor and his non-filing spouse, the amount of the check is comprised of two separate causes of action, Debtor's personal injury claim and Debtor's non-filing spouse's loss of consortium claim.

CONCLUSIONS OF LAW

The issue before the Court for its determination is whether Debtor has properly claimed a settlement check that is comprised of two separate causes of action as exempt by virtue of tenants by the entireties.¹

Pursuant to 11 U.S.C. § 522(b)(2)(B), an individual is entitled to exclude from the bankruptcy estate " ... any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety ... to the extent that such interest is exempt from process under applicable nonbankruptcy law." 11 U.S.C. § 522(b)(2)(B).

Under Florida law, entireties property belongs to neither spouse individually, but to a separate entity created by their marriage. See Bundy, 235 B.R. at 112. Thus, personal property owned by spouses as tenants by the entireties is exempt from inclusion in the bankruptcy estate of either spouse as an individual debtor. Id.

"The legitimate expectations of the parties regarding an account jointly held by them as a married couple should be no different than a home jointly owned by them as a married couple." Beal Bank, SSB v. Almand and Assoc., 780 So.2d 45, 58 (Fla. 2001). In Beal Bank, the creditor attempted collection on judgments by garnishing several bank accounts held by the debtors and their wives. Id. at 49. The Florida Supreme Court found that if the unities required to establish a tenancy by the entireties existed as to a bank account, then a creditor was required to prove a tenancy by the entireties did not exist to collect from that bank account. Id. at 48-49. Further, the court held that a rebuttable presumption arises as to the existence of a tenancy by the entireties if the signature card that the bank account is titled in does not specifically disclaim ownership by the entireties and all other unities necessary for ownership are established. Id. at 60. Although the court's holding limited the tenancy by entireties presumption towards joint bank accounts, the court did recognize that valid policy reasons

¹ Counsel for the Trustee also seeks to have the Court make a determination that the settlement reached may be voided by the Trustee upon the basis that only a trustee has the authority to settle and release a debtor's pre-petition cause of action. However, that issue is not before the Court. The sole issue before the Court is whether Debtor's personal injury proceeds are exempt as tenants by the entireties.

exist for extending the presumption to jointly owned personal property. Specifically, the court reasoned that, “stronger policy considerations favor allowing the presumption in favor of a tenancy by the entireties when a married couple jointly owns personal property.” Id. at 57.

In the instant case, Debtor argues that the Florida Supreme Court’s decision in Beal Bank extends to all personal property and not just to joint bank accounts. Conversely, the Trustee argues that the holding in Beal Bank is limited to bank accounts and that the Court should therefore not extend the breadth of the Florida Supreme Court’s decision. Prior to the Florida Supreme Court’s holding in Beal Bank, this Court held that if personal property is involved a debtor must prove the intent existed to create an entireties estate in the personal property. In re Howe, 241 B.R. 242, 246 (Bankr. M.D. Fla. 1999), In re Bundy, 235 B.R. 110, 112 (Bankr. M.D. Fla. 1999). However, since Beal Bank, the prevailing line of reasoning is towards recognizing a presumption of tenancy by entireties in personal as well as real property. Cacciatore v. Fisherman’s Wharf Realty Ltd. P’ship, 821 So.2d 1251, 1252 (Fla. 4th Dist. Ct. App. 2002), In re Daniels, 309 B.R. 54, 59 (Bankr. M.D. Fla. 2004), In re Kossow, 325 B.R. 478 (Bankr. S.D. Fla. 2005), In re Mathews, No. 05-1105, 2007 WL 174162, at * 8 (Bankr. M.D. Fla. Jan. 18, 2007). This line of cases recognizes that applying the presumption will decrease the confusion involved in establishing proof of intent, as to what form of tenancy was intended to be established by a married couple, in instances where all unities of a tenancy by entireties are present. The Court agrees with the line of reasoning set forth in the above cases that have recently explored the breadth of the Beal Bank decision. Accordingly, the Court finds that the presumption applies to personal property in instances where all the unities of a tenancy by the entireties are present.

As the Court has found that the presumption applies towards personal property, the burden is on the Trustee to prove by a preponderance of the evidence that Debtor and his wife do not possess the settlement check as tenants by the entireties. Beal Bank, 780 So. 2d at 58-59. Property held as tenancy by the entireties possesses six characteristics: (1) unity of possession (joint ownership and control); (2) unity of interest (the interests in the account must be identical); (3) unity of title (the interests must have originated in the same instrument); (4) unity of time (the interests must have commenced simultaneously); (5) survivorship; and (6) unity of marriage (the parties must be married at the time the property became titled in their join names). Id. at 52. As discussed above, the personal property at issue is a \$35,000 settlement check, made out to Borden Hallowes, Attorney and Keith Perea and Lydia Perea. (Trustee’s Ex. 7). The check represents the settlement amount

reached by Debtor and his non-filing spouse for two distinct causes of action, Debtor’s personal injury claim and Debtor’s non-filing spouse’s loss of consortium claim. As the check encompasses two separate causes of action the issue the Court is most concerned with is whether Debtor and his non-filing spouse possess identical interests in the check.

“ A loss of consortium claim, although not derivative is a separate and distinct cause of action.” Hendrix v. Raybestos-Manhattan, Inc., 776 F.2d 1492, 1509 (11th Cir. 1985). A finding by this Court that Debtor and his non-filing spouse’s interest in the check are identical would create quite a conundrum. As a loss of consortium claim is a separate and distinct cause of action, it is a logistical impossibility that Debtor and his non-filing spouse would share an identical interest in the settlement check. Further, Debtor’s non-filing spouse does not share an interest in Debtor’s personal injury claim, as the compensation he sought through that specific cause of action are for his injuries alone. Accordingly, the Court finds that the characteristic of unity of interest is not met. Even assuming, without deciding, that the remaining unity of interests are present, property held as tenancy by the entireties must possess all six characteristics, therefore the Trustee has met her burden of overcoming the presumption of tenancy by the entireties.

CONCLUSION

Based upon the above, the Court sustains Trustee’s Objection to Debtor’s Claim of Exemptions. As the settlement check was not pro-rated, Debtor and his non-filing spouse shall divide the \$35,000 between themselves. As Debtor’s share of the settlement check is property of the bankruptcy estate, Debtor shall select \$1,000.00 worth of personal property and turn the remainder over to the Trustee within ten (10) days of the entry of an order sustaining the Trustee’s objection. The Court will enter a separate order that is consistent with these Findings of Fact and Conclusions of Law.

Dated this 13 day of March, 2007 in Jacksonville, Florida.

/s/ George L. Proctor
George L. Proctor
Unites States Bankruptcy Judge

Copies to:
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