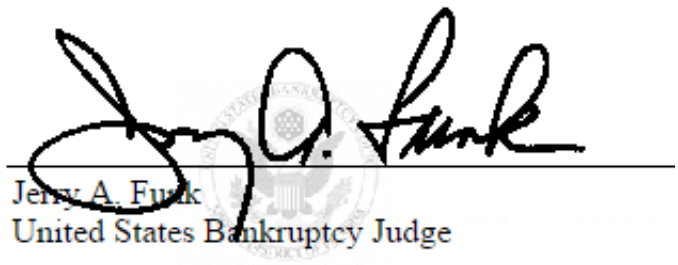
ORDERED.

Dated: May 19, 2017



Jerry A. Funk
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

IN RE:

ASAD U. QAMAR and
HUMERAA QAMAR,

Case No. 3:16-bk-1490-JAF
Chapter 11

Debtor.
_____/

ORDER SUSTAINING THE UNITED STATES TRUSTEE'S OBJECTION TO DEBTORS' CLAIMS OF EXEMPTION UNDER 11 U.S.C. § 522(b)(3)(B)

This case is before the Court upon the Acting United States Trustee's (the "U.S. Trustee") Amended Objection (Doc. 223) to Asad U. Qamar's and Humeraa Qamar's (the "Debtors") Claims of Exemption under 11 U.S.C. § 522(b)(3)(B) (Doc. 40 at 18-22). The U.S. Trustee submitted a brief in support of his objection, and Debtors submitted a brief in opposition. (Docs. 292, 293). After reviewing the written submissions and argument of counsel, the Court sustains the Objection. The Court holds that the filing of a joint bankruptcy petition by spouses does not destroy a tenancy by the entirety. However, joint creditors of both spouses may reach property held in tenancy by the entirety as provided-for by Florida law. Beal Bank, SSB v. Almand & Assocs., 780 So. 2d 45,

53 (Fla. 2001) ("[W]hen property is held as a tenancy by the entireties, only the creditors of both the husband and wife, jointly, may attach the tenancy by the entireties property.").

Background

On April 20, 2016 (the "Petition Date"), Debtors filed a joint petition for relief under Chapter 11 of the Bankruptcy Code. (Doc. 1). At all relevant times, Debtors have been married. Debtors filed their Schedule C on May 11, 2016. (Doc. 40). In the Schedule C, Debtors claim numerous pieces of personal and real property located in Florida as exempt, pursuant to 11 U.S.C. § 522(b)(3)(B).[1] In Schedule E/F, Debtors list various unsecured debt held by joint creditors. (Doc. 40 at 25-35). There is no factual dispute as to whether the subject property was held in tenancy by the entirety on the Petition Date. (Doc. 292 at 4 n.2) ("The [U.S. Trustee] does not dispute that the unities were present pre-petition.").

The U.S. Trustee filed his Amended Objection to these claims of exemption on November 22, 2016. (Doc. 223). In his brief, the U.S. Trustee argues two points: 1) the "conveyance" to the bankruptcy estate of any property held in tenancy by the entirety destroys the tenancy because the "conveyance" to the bankruptcy estate defeats the necessary unities for the tenancy to exist, and, alternatively, 2) the tenancy-by-the-entirety exemption is not applicable, under Florida law, to the joint creditors of both spouses. (Doc. 292). Debtors presented no counterargument to the U.S. Trustee's second argument concerning joint creditors and Florida law. (Doc. 293).

[1] In his brief in support of the Amended Objection, the U.S. Trustee states the objection to the claim of exemption as to Debtors' real property located at 150 Central Park South, #702, New York, NY (the "New York Property") "is moot" in light of intervening events. (Doc. 292 at 3, ¶ 4). Therefore, this Order does not address and does not apply to any property located outside of Florida.

Analysis

"Commencement of a bankruptcy case creates an estate consisting of all debtors' property pursuant to § 541. However, a debtor may exempt certain property from the estate pursuant to § 522. Section 522 provides for two exemption schemes. Florida has opted out of the federal exemptions and provides for exemptions under state law." In re Parker, 147 B.R. 810, 812 (Bankr. M.D. Fla. 1992); § 222.20, Fla. Stat. (2015) (opting out of federal exemptions). "State law determines the nature and extent of a debtor's interest in property. However, federal law determines the extent to which a debtor's interest in property is property of the bankruptcy estate." In re Peet, 529 B.R. 718, 719 (B.A.P. 8th Cir. 2015).

Section 522(b)(1) of the Bankruptcy Code provides: "Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (2) or, in the alternative, paragraph (3) of this subsection." 11 U.S.C. § 522(b)(1) (2016). Property listed in paragraph (3) includes, inter alia, "any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law." 11 U.S.C. § 522(b)(3)(B) (2016). As applied to the circumstances of this case, the phrase "nonbankruptcy law" means Florida law.

Florida law defines the property rights at issue and the six characteristics (or "unities") required for a tenancy by the entirety. Beal Bank, SSB v. Almand & Assocs., 780 So. 2d 45, 52 (Fla. 2001) (stating the six unities). Florida law also provides that, "when property is held as a tenancy by the entireties, only the creditors of both the husband and wife, jointly, may attach the tenancy by the entireties property; the property is not divisible on behalf of one spouse alone, and therefore it cannot be reached to satisfy the obligation of only one spouse." Id. at 53.

In Peet, the bankruptcy appellate panel analyzed whether the creation[2] of the bankruptcy estate, by operation of § 541, "severed the joint tenancies in the [ ] property . . . and converted those joint tenancies to tenancies in common." In re Peet, 529 B.R. 718, 720 (B.A.P. 8th Cir. 2015). The Peet court held that "[n]othing in the bankruptcy code effects a conveyance of a debtor's interest in a joint tenancy that would sever the joint tenancy." Id. The court compared the changes brought about by the Bankruptcy Reform Act of 1978 with the prior Bankruptcy Act of 1898. "The absence of any language of conveyance in the [post-1978] bankruptcy code is in marked contrast to the Bankruptcy Act of 1898, which originally provided, in pertinent part:"

> The trustee of the estate of a bankrupt, upon his appointment and qualification, ... shall ... be vested by operation of law **with the title of the bankrupt**, as of the date he was adjudged a bankrupt, except in so far as it is to property which is held to be exempt[.]

Id. (emphasis added) (quoting Bankruptcy Act of 1898, 30 Stat. 544, 565 at § 70(a)).

However, with the 1978 Reform Act, "Congress eliminated the provisions of the old Bankruptcy Act which vested 'title' in the [bankruptcy] trustee by operation of law." In re Benner, 253 B.R. 719, 721 (Bankr. W.D. Va. 2000). "Thus, the concept of 'title' in the [bankruptcy] trustee as a basis for determining what property the trustee will administer in a [bankruptcy case] ended with the enactment of the Bankruptcy Reform Act of 1978." Id. at 721-22. While a traditional trustee, defined in the broadest sense, receives title to property *held in trust* for the benefit of a beneficiary, a bankruptcy trustee does not. In contrast, a bankruptcy trustee administers the bankruptcy estate. Also, although Peet dealt with a joint tenancy, the court's reasoning applies equally to a tenancy by the entirety because § 522(b)(3)(B) treats both tenancies equally.

[2] "The commencement of a case . . . creates an estate. Such estate is comprised of all the following property . . . ." 11 U.S.C. § 541(a) (2016); see also *Bankr. Exemption Manual* § 2:1 (2016 ed.) ("Section 541(a), which defines the property of the bankruptcy estate, generally encompasses all property, both legal and equitable, including exempt property.").

Judge May recently spoke on the issue in In re Smith, 2016 WL 675806 (Bankr. M.D. Fla. Feb. 18, 2016). The Smith court concluded that "[t]he filing of the joint petition does not destroy any of the unities required for the Debtors to continue to hold the [property] as TBE." Smith, at *4. The court agreed with the debtors that "it would make little sense for the [d]ebtors to be afforded greater protections by virtue of their TBE ownership in personal property outside of bankruptcy than in bankruptcy." Id. Moreover, if the filing of a joint petition destroyed a tenancy by the entirety, "§ 522(b)(3)(B) is rendered moot in all jointly filed cases as joint debtors could never exempt property owned as TBE [as to any creditor]. Such a result is inconsistent with how the interests of married joint debtors are treated in bankruptcy." Id. at *3.

Lastly, the Eleventh Circuit provides tangential, but instructive, analysis in In re Reider, 31 F.3d 1102 (11th Cir. 1994). In Reider, the Eleventh Circuit said "[t]he filing of a joint petition by a husband and wife does not result in the automatic substantive consolidation of the two debtors' estates." Reider 31 F.3d at 1109. "Joint administration is designed for the ease of administration and . . . is thus a procedural tool, . . . it does not create substantive rights." Id. "By contrast, substantive consolidation 'is no mere instrument of procedural convenience . . . but a measure vitally affecting substantial rights." Id. It seems that if a joint filing does not create substantive rights, then a joint filing also cannot destroy substantive rights such as prepetition property rights—or, at least, a joint filing cannot destroy substantive rights that a separate/singular filing cannot.

Here, the U.S. Trustee asks the Court to hold either that a) the filing of the joint petition destroys a tenancy by the entirety and, therefore, the exemption found in § 522(b)(3)(B) does not apply to any creditor (neither joint nor separate creditors) or, in the alternative, b) the exemption found in § 522(b)(3)(B) does not apply to joint creditors in light of Florida law allowing joint creditors of both spouses to reach property held in tenancy by the entirety. The Court adopts the

reasoning espoused by the bankruptcy appellate panel in Peet and concludes that the filing of a joint petition does not defeat the unities of tenancy by the entirety. However, joint creditors of both spouses may reach tenancy-by-the-entirety property located within Florida, as provided-for by Florida law. Beal Bank, 780 So. 2d at 53; 11 U.S.C. § 522(b)(3)(B) (2016).

In support of his argument, the U.S. Trustee relies on footnote 6 of In re Himmelstein, 203 B.R. 1009 (Bankr. M.D. Fla. 1996). Himmelstein involved a debtor and non-debtor spouse; it was not a jointly filed case. In footnote 6, this Court stated: "by filing a joint petition, [the joint debtors], in essence, 'convey' the property to the trustee, which destroys the unities." Id. at 1014 n.6. Because that case and adversary proceeding did not involve joint-filing spouses, the statement in the footnote was not necessary for the court to reach its ultimate holding. In other words, it was dicta. To the extent any support for the U.S. Trustee's argument can be found in Himmelstein, this Court recedes from Himmelstein. Himmelstein should not be used to support the argument that filing a joint petition destroys a joint tenancy or tenancy by the entirety.

Accordingly, it is hereby ORDERED that the U.S. Trustee's objection is SUSTAINED as to only joint creditors of both spouses.

The U.S. Trustee shall serve a copy of this order on all interested parties and file a proof of service within three days of the date of this Order. However, in the event that all parties are represented by counsel or have consented to service via CM/ECF, this Order shall be served by use of CM/ECF. Counsel is not required to file a separate proof of service under those circumstances.