



United States Bankruptcy Court
District of Delaware
824 N. Market Street
Wilmington, DE 19801

Chambers of Christopher S. Sontchi
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December 18, 2012

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RE: Clarencinia D. Willis
Case No.: 07-10046

Dear Counsel:

Before the Court is the Chapter 7 trustee's timely objection to Debtor's asserted exemption of an employment discrimination claim. Debtor's bankruptcy was commenced in 2007. Although the discrimination claim arises from pre-petition events, it was not included in Debtor's original schedules. Five years later, in the course of the employment discrimination litigation, Debtor's trial counsel became aware of his client's previous bankruptcy. New bankruptcy counsel was retained and the Chapter 7 case was reopened for the purpose of revising Debtor's schedules to include the employment discrimination claim as an exempted asset. Debtor's Amended Schedule B-21 now lists an "[e]mployment claim against Riverwalk Hospitality Group LLC, et al." with a current value of \$10. Concomitantly, under section 522(b)(3) of the Bankruptcy Code, Amended Schedule C-1 lists the discrimination claim as exempt under 10 Del.C. § 4914(b) – the so called "wildcard exemption" – in the amount of \$10.

Citing the Supreme Court's 2010 decision in *Schwab v. Reilly*¹ and recent decisions by the Third Circuit,² Debtor argues that her interest in the employment discrimination claim is

¹ *Schwab v. Reilly*, 130 S.Ct. 2652 (2010).

² *In re Messina*, 687 F.3d 74 (3rd Cir. 2012), and *In re Orton*, 687 F.3d 612 (3rd Cir. 2012).

properly valued at \$10 because that was the reasonable value of the claim as of the original bankruptcy filing in 2007. She further argues that she has given proper notice of her intent to exempt the claim *in its entirety* and any increase in the value of the claim in excess of \$10, regardless of the amount, is not property of the estate.

Debtor is wrong on several points. First, the actual holding in *Schwab* is inapplicable to this case. The issue in *Schwab* was, notwithstanding an *untimely* challenge to a debtor's exemptions, under what circumstances could the trustee rely upon the debtor's schedules so as not to be required to object to the exemption of the asset within the prescribed time limit in order to preserve the trustee's ability to recover on behalf of the debtor's estate any value in the asset beyond the dollar value the debtor expressly declared as exempt in the schedules.³ The trustee in this case asserted a *timely* objection to the exemption at issue in this case and, thus, the holding in *Schwab* is inapplicable.

Second, while the holding in *Schwab* is not applicable, the reasoning underlying the Supreme Court's decision informs this Court's analysis. Debtor's asserted exemption of the employment discrimination claim in this case is of an interest in property, the value of which may not exceed a certain dollar amount, in a particular asset. The exemption is *not* of the asset itself.⁴ As such, unless otherwise ordered, any value of the discrimination claim in excess of the amount of Debtor's interest in the claim is property of the estate.

Third, under *Schwab*, "[w]here, as here, it is important to the debtor to exempt the full market value of the asset or the asset itself, . . . the debtor [should] declare the value of her claimed exemption in a manner that makes the scope of the exemption clear. As examples of how to successfully accommodate this, the [Supreme] Court suggested that debtors 'list[] the exempt value as 'full fair market value (FMV)' or '100% of FMV.'"⁵ However, there are two important caveats. As discussed above, the holding in *Schwab* applies to an untimely challenge to the exemptions. A debtor cannot expand the scope of the "property claimed as exempt" from an interest in an asset, not to exceed a certain dollar amount, to 100% of the asset's fair market value or the asset itself in the face of a timely objection to the exemption. To do so would render the limits as to the dollar value of exemptions moot. Moreover, the Supreme Court itself stated in *Schwab* that it is "far from obvious" that the Bankruptcy Code would "entitle" a debtor to clear title to an asset even if the debtor claimed as exempt a "full" or "100%" interest in the asset."⁶

³ *Schwab*, 130 S.Ct. at 2657.

⁴ *Id.* at 2661-62.

⁵ *Orton*, 687 F.3d at 616 (quoting *Schwab* at 2668). See also *id.* at 617 ("At the very least, the Court was clear that exemptions under § 522(d)(5) are presumed to preserve a debtor's "interest" in an asset rather than the asset itself; a debtor seeking to retain more than an "interest" must indicate that fact unambiguously in the Schedules.").

⁶ *Schwab*, 130 S.Ct. at 2669 n. 21.

Fourth, Debtor's claim that the value of the asset, *i.e.*, the employment discrimination claim, is valued as of the date of the bankruptcy filing is correct.⁷ Moreover, for purposes of this Motion, the Court finds that the fair market value of the claim as of the filing is, as Debtor asserts, \$10.⁸ However, Debtor is not entitled to any appreciation of the claim's value. As the Third Circuit held in *Orton*, "[w]hen a debtor retains only an interest in an asset, rather than the asset itself, the debtor is limited to the value of the exemption; the estate is entitled to any appreciation in the asset's value beyond the amount exempted."⁹

Indeed, *Orton* is directly on point. The debtor in *Orton* claimed a property exemption in a one-fourth interest in a royalty interest under an oil and gas lease, to which he assigned a fair market value of one dollar. As of the bankruptcy filing, no well had been drilled on the property and no royalties were due. After applying *Schwab* to determine that *Orton*'s exemption was limited to his quarter interest in the oil and gas lease, the Third Circuit turned to the question of whether any future appreciation in the value of the interest in the oil and gas lease would accrue to the debtor or to the estate, which the court said was "easily decided."

[An] estate's entitlement is not set in stone at the time of filing, much less at any other time. To the contrary, the quintessential purpose of limiting a debtor to a dollar-amount exemption is to permit the trustee to liquidate assets in the best interest of the creditors by cashing out the debtor, effectively removing him from considerations about how to administer the estate. To that end, § 541(a)(6) establishes that any "[p]roceeds, products, offspring, rents or profits of or from property of the estate"—in other words, appreciation of value—become the property of the estate as well.¹⁰

Thus, Debtor's interest in her "[e]mployment claim against Riverwalk Hospitality Group LLC, et al." is exempt in the amount of \$10. Any appreciation in the claim's value in excess of \$10 is property of the estate.¹¹

⁷ *In re Messina*, 687 F.3d at 82 ("Filing for bankruptcy does not create new property rights or value where there previously were none. [Debtors'] property interests were determined as of the date they filed for bankruptcy.") (internal citations omitted).

⁸ Under Bankruptcy Rule 4003(c), the trustee "has the burden of proving that the [exemption is] not properly claimed." The Court need not delve into the standard governing the sufficiency of factual evidence required under this rule. Taking all the factual assertions of Debtor as true the trustee has nonetheless met his burden in this case as a matter of law.

⁹ *Orton*, 687 F.3d at 618-19.

¹⁰ *Id.* at 619.

¹¹ In a footnote to Schedule B-21, Debtor reserves her right to assert a substantial contribution claim against the estate. The Court is making no ruling as to the allowance or amount of any such claim. The rights of the parties are fully reserved on this issue.

That leaves two minor issues: (1) whether Debtor should be given the opportunity to amend her schedule B-21 to increase the amount of the exemption to the maximum allowed under the law; and (2) should Debtor or the trustee remain in control of the employment discrimination claim, *i.e.*, the pending lawsuit.

Turning to the first point, the amount of the exemption available under 10 Del.C. § 4914(b) is \$25,000. Exclusive of the employment discrimination claim, Debtor has not exempted property in the full amount available under the statute. The Court is not inclined to grant Debtor yet another opportunity “to get it right.” Nonetheless, even though Debtor is only entitled to an exemption in the stated amount of \$10, the Court understands that the trustee has agreed that the amount of the claim exemption may be increased to the maximum amount available under the law. The Court will approve the trustee’s offered compromise.

As to the second point, the trustee will be granted exclusive control over the employment discrimination claim, including any litigation. The issue is simply one of incentives. Debtor’s interest in the claim (as amended) is approximately \$18,000. Thus, she has no incentive to seek a recovery in excess of that amount even if the claim were worth far more. The trustee represents Debtor’s creditors who are the residual risk bearers under the claim. If the trustee determines the claim has little or no value he will quickly abandon it back to Debtor. If, however, the claim may be worth more than the exemption he will have the proper incentive to maximize the recovery on the claim. As such, he is clearly the appropriate party to control prosecution of the claim.

In sum, Debtor’s interest in the employment discrimination claim is limited to the amount of money available under the “wildcard exemption,” 10 Del.C. § 1409(b). Any amount of money in excess of the exemption, including any subsequent appreciation, is property of the estate. Finally, the trustee will be granted control over the employment discrimination claim, including the pending litigation.

The trustee is instructed to submit an order under certification of counsel.

Very truly yours,



Christopher S. Sontchi
United States Bankruptcy Judge