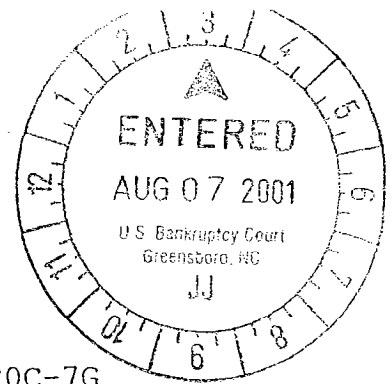


UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION



IN RE:)
)
Roy L. Skinner,) Case No. 01-11020C-7G
)
Debtor.)
)

MEMORANDUM OPINION

This case came before the court on July 17, 2001, for hearing upon objections by the Trustee and AmeriSource Corporation to the Debtor's claim for exempt property. Gerald S. Schafer appeared on behalf of the Trustee, Benjamin A. Kahn appeared on behalf of AmeriSource Corporation ("AmeriSource") and Dirk W. Siegmund appeared on behalf of the Debtor. For the reasons hereinafter stated, both objections are being overruled.

FACTS

On December 12, 2000, AmeriSource obtained a judgment against the Debtor in the Superior Court of Guilford County in an amount in excess of \$1,100,000.00. Following the entry of this judgment, AmeriSource filed a request with the Clerk of Superior Court of Guilford County for the issuance of a writ of execution against the Debtor. Pursuant to N.C.G.S. § 1C-1603(a)(4), a notice of right to have exemptions designated was served upon the Debtor notifying the Debtor that he had twenty days to claim his property exemptions. The Debtor served a motion to claim exempt property upon the plaintiff within twenty days, but apparently failed to file the motion with the Clerk of Superior Court within the required twenty

days. AmeriSource then filed an objection to Debtor's motion to claim exempt property, asserting that Debtor had waived his exemptions under N.C.G.S. § 1C-1601(c)(3)¹ as a result of his failure to file the motion to claim exempt property within twenty days. On April 9, 2001, an order was entered in the Superior Court of Guilford County sustaining AmeriSource's objection to Debtor's motion to claim exempt property and denying the motion. Thereafter, on April 11, 2001, a writ of execution was issued by the Clerk of Superior Court of Guilford County against the Debtor. This Chapter 7 case was filed on April 16, 2001, while the writ of execution was still outstanding.

THE EXEMPTIONS CLAIMED IN THIS CASE

On the same day that this case was filed, Debtor also filed with this court his claim for property exemptions pursuant to § 522(1) of the Bankruptcy Code and Rule 4003 of the Federal Rules of Bankruptcy Procedure. The Debtor claimed as exempt a 1997 automobile with a value less than the amount owed on the vehicle, household furnishings with a net value of \$1,875.00, a \$20,351.01 IRA, his interest in a retirement plan with a value of \$20,057.57

¹N.C.G.S. § 1C-1601(c)(3) provides that "[t]he exemptions provided in this Article and in Section 1 and 2 of Article X of the North Carolina Constitution, cannot be waived except by . . . [f]ailure to assert the exemptions after notice to do so pursuant to G.S. 1C-1603."

and \$3,500.00 from an annuity owned by the Debtor.²

THE OBJECTIONS TO DEBTOR'S
CLAIM FOR PROPERTY EXEMPTIONS

Both of the parties objecting to Debtor's claim for property exemptions rely upon waiver as the basis for their objections. Both assert that a waiver by the Debtor of the right to claim exemptions occurred when the Debtor failed to properly claim his exemptions in state court and that the Debtor therefore is barred from claiming any property as exempt in this bankruptcy case. AmeriSource makes the additional contention that the waiver "enures only to the benefit of AmeriSource" and that after payment of the Trustee's cost of administration, AmeriSource should receive all of the proceeds realized from the Trustee's liquidation of the property described in Debtor's claim for property exemptions.

ANALYSIS

The rule adopted in the Fourth Circuit is that in an opt-out state exemptions depend upon state law for both procedure and substance. See In re Nguyen, 211 F.3d 105 (4th Cir. 2000); Zimmerman v. Morgan, 689 F.2d 471 (4th Cir. 1982). Based upon this

²The property that may be exempted by a debtor in a bankruptcy case is controlled by § 522(d) of the Bankruptcy Code unless the state in which the bankruptcy court is located has opted out of § 522(d), in which event the property that may be claimed as exempt is controlled by state law. North Carolina, in N.C.G.S. § 1C-1601(f) has opted out of § 522(d). Hence, the property claimed as exempt by the Debtor in the present case was based upon N.C.G.S. § 1C-1601 which describes the property interests that may be exempted in North Carolina.

rule, AmeriSource and the Trustee argue that this court should look to North Carolina law to determine whether the Debtor has waived the right to claim exemptions in this bankruptcy case. The court readily accepts the argument that under North Carolina law, a waiver of the right to retain property free from the claims of creditors, i.e., the right to claim property as exempt, may occur as a result of a debtor not following the procedure set forth in N.C.G.S. § 1C-1603 for claiming exemptions. However, the court does not accept the arguments of AmeriSource and the Trustee regarding the ultimate effect of such a waiver under North Carolina law, nor regarding the effect that such a waiver should have in a subsequent bankruptcy case or, more particularly, in the present case.

The definitive case in North Carolina regarding waiver of the right to claim exemptions is Household Finance Corp. v. Ellis which was decided by the North Carolina Court of Appeals in 1992 (107 N.C. App. 262, 419 S.E.2d 593) and affirmed by the North Carolina Supreme Court in 1993 (333 N.C. 785, 429 S.E.2d 716). In Ellis the judgment debtor had failed to file a timely motion to claim exemptions after being served with a notice to do so pursuant to N.C.G.S. § 1C-1603. The judgment creditor contended that such failure resulted in a permanent waiver such that the debtor would forever be barred from claiming his exemptions. The argument for a permanent waiver was rejected in Ellis, the court reasoning that

"[r]equiring a debtor to forever waive his rights for failure to respond to a single notice contradicts the spirit of the entire statutory section on exemptions and applicable case law." 107 N.C. App. at 267, 419 S.E.2d at 595. Instead of a permanent waiver, the court held that "any waiver applies only to the particular execution issued." Id. In so holding, the court emphasized the longstanding North Carolina policy regarding exemptions under which "provisions which restrict a debtor's access to his exemptions should be construed narrowly" and debtors are "allowed a great deal of flexibility in claiming and maintaining their exemptions." Id. at 266, 419 S.E.2d at 595.³

It is clear from the decision in Ellis that the failure of the Debtor in the present case to file a timely motion to designate exempt property in state court did not result in a permanent waiver of his right to claim exemptions, nor does it mean that following

³In arguing against the allowance of Debtor's claim for property exemptions, AmeriSource relies heavily upon cases that were decided before the decision in Ellis, including United States v. Scott, 45 B.R. 318 (M.D.N.C. 1984), and In re McLamb, 93 B.R. 72 (Bankr. E.D.N.C. 1988). From the opinions in these cases, it appears that the disallowance of exemptions was based upon an interpretation of state law that a failure to claim exemptions in accordance with N.C.G.S. § 1C-1601 gave rise to a permanent waiver of exemptions. The Ellis case establishes that North Carolina law is to the contrary and, as noted in In re Pinner, 146 B.R. 659 (Bankr. E.D.N.C. 1992), represents a development necessitating a reappraisal of the rulings adopted before the Ellis case was decided. Given the change that has occurred in controlling state law, the court believes that the situation presented in this case is distinguishable from the situation that existed when Scott and McLamb were decided.

such failure there never can be property of the Debtor that is exempt under North Carolina law. Instead, under Ellis, any resulting waiver is temporary and is limited to a particular execution. The situation thus presented in the present case is that the only impediment to the Debtor claiming exemptions is a temporary waiver that is limited to a single execution and a single creditor, and which continues no longer than the period during which the execution continues to be viable. For the reasons hereinafter discussed, the court concludes that such a temporary waiver does not operate to bar a debtor's ability to exempt property from the bankruptcy estate in a subsequent bankruptcy case.

Under North Carolina law the period during which an execution continues in effect and is enforceable varies according to the circumstances of the particular case. Pursuant to N.C.G.S. § 1-310, an execution must be returned to the court from which it was issued "not more than 90 days" from the date of issuance. While this statute establishes the maximum period during which an execution remains effective, the actual life of an execution may be considerably shorter than 90 days. For example, as was noted in the Ellis opinion, the judgment creditor may recall the execution and have it returned before the expiration of 90 days. Also, it has long been the law of North Carolina that the sheriff may return the execution earlier than its expiration date if no property can

be found from which to satisfy the execution. See Whitehead v. Hellen, 74 N.C. 679 (1876).

Turning to the AmeriSource execution, the court concludes that upon the filing of this case, the execution no longer was executable and effectively terminated. This result flows from a confluence of various provisions of the Bankruptcy Code. As the court noted in In re Nguyen, 211 F.3d 105, 107 (4th Cir. 2000), "[u]pon the filing of a petition for bankruptcy, all of the debtor's legal and equitable interests in property become part of the bankruptcy estate" pursuant to § 541. In the present case, this means that all of the property at issue (i.e., the property described in Debtor's motion for property exemptions) became and remains property of the bankruptcy estate in this case.⁴ Section 362 of the Bankruptcy Code also became operative immediately upon the filing of this case. Under § 362(a)(2) and (6) the sheriff was immediately enjoined from acting to enforce the execution against the Debtor or any property of the bankruptcy estate, including the property described in Debtor's claim for exemptions in this case. Moreover, when this case was filed, § 544(a)(1) of the Bankruptcy Code became operative and vested the Trustee with the rights and powers to avoid any transfer or

⁴This may not be the case with Debtor's interest in the retirement plan if the retirement plan is ERISA qualified. See Patterson v. Shumate, 504 U.S. 753, 112 S.Ct. 2242, 119 L.Ed.2d 510 (1992) (applying the exception in § 541(c)(2) to ERISA qualified retirement plans).

obligation of the Debtor that is avoidable by a hypothetical creditor on a simple contract with a judicial lien on the property of the Debtor that remained unsatisfied as of the date of the commencement of this case. In short, when this case was filed the Trustee stepped into the shoes of a creditor with a judicial lien against the Debtor's property. While, these rights and powers are conferred upon the Trustee by federal bankruptcy law, the extent of the Trustee's rights as a judicial lien creditor is controlled by the substantive law of the state in which the bankruptcy is located. See 5 COLLIER ON BANKRUPTCY ¶ 544.02 (Lawrence P. King 15th ed. 2000). In North Carolina, as else where, the rights of a judicial lien creditor are superior to those of a creditor such as AmeriSource with a claim but no lien. Since the Trustee's judicial lien extends to all of the property of the Debtor, carrying with it the exclusive power to administer all such property in the bankruptcy court, all of the Debtor's property in the present case was placed permanently beyond the reach of the AmeriSource execution, and the execution was thus rendered unenforceable and effectively terminated. Under Ellis any waiver by the Debtor of the right to claim exemptions ended when the execution terminated, which occurred upon the filing of this case. The waiver having ended, the Debtor was fully entitled to exercise the right to claim exemptions. Therefore, consistent with the strong North Carolina policy of narrowly construing restrictions on debtors' access to

their exemptions and allowing debtors a great deal of flexibility in claiming and maintaining their exemptions, the objections to the exemptions claimed by the Debtor will be overruled.

The court also rejects AmeriSource's argument that it has the exclusive right to the property claimed as exempt. Once property of a debtor becomes property of the bankruptcy estate it remains in the estate to be administered in the bankruptcy case unless it is removed from the estate through an effective exercise of the debtor's right to exempt, is released to a creditor having a valid lien on such property or is abandoned by the trustee pursuant to § 554. Therefore, even if the Debtor were not entitled to exempt the property described in his claim for property exemptions, such property would remain in the bankruptcy estate to be administered by the Trustee in accordance with the provisions of the Bankruptcy Code, including the distributive provisions contained in § 726.

Although AmeriSource obtained a final judgment against the Debtor and obtained the issuance of a writ of execution in state court before this case was filed, such circumstances do not elevate its claim beyond that of any other general unsecured creditor. By statute, a judgment creditor in North Carolina does not have a lien on personal property of the judgment debtor unless and until the sheriff has levied on personal property. The controlling language, found in N.C.G.S. § 1-313(1), provides that "no execution against the property of a judgment debtor is a lien on his personal

property, as against any bona fide purchaser for value, or as against any other execution, except from the levy thereof." See also M. & J. Finance Corp. v. Hodges, 230 N.C. 580, 583, 55 S.E.2d 201, 204 (1949) ("[A] judgment constitutes no lien upon the personal property of the judgment debtor . . . [i]t is the levy under execution that creates the lien in favor of the judgment creditor."). No levy having occurred under the AmeriSource execution, AmeriSource has no lien and is simply a general unsecured creditor in this case.

The filing of this case means that the rights of AmeriSource with respect to property of the estate and the proceeds therefrom must be determined under the Bankruptcy Code as written by Congress. See New York v. Rassner, 127 F.2d 703 (2d Cir. 1942) (order of distribution in bankruptcy is fundamentally a question of federal law). The courts do not have the authority under § 105 or general principles of equity to rewrite the provisions of the Bankruptcy Code in order to give a particular creditor different treatment than provided under the Bankruptcy Code. See United States v. CF & I Fabricators, 518 U.S. 213, 116 S.Ct. 2106, 135 L.Ed.2d 506 (1996) (categorical reordering of the priorities established in the Bankruptcy Code through the legislative process is beyond the scope of judicial authority). When it comes to unsecured creditors, the controlling concept is the bedrock principle of pro rata distribution incorporated into

§ 726 of the Bankruptcy Code. Hence, as a general unsecured creditor, AmeriSource is entitled to no more or no less than any other general unsecured creditor in this case.

CONCLUSION

In accordance with the foregoing findings of fact and conclusions of law, orders are being entered contemporaneously with the filing of this memorandum opinion overruling the objections to the Debtor's claim for property exemptions.⁵

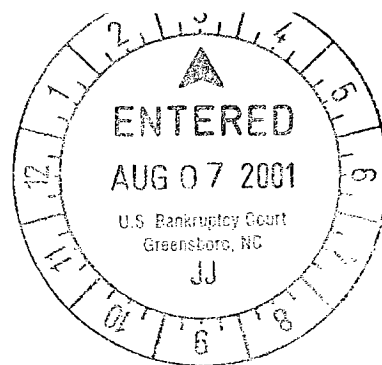
This 7th day of August, 2001.

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge

⁵Because the court has concluded that the Debtor has not waived the right to claim exemptions in this case, the court has not addressed the Debtor's alternative argument that he should be relieved of any waiver that occurred under the provision contained in N.C.G.S. § 1C-1601(3) which provides that the clerk or district court judge may relieve a waiver made by reason of mistake, surprise or excusable neglect, to the extent that the rights of innocent third parties are not affected.

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION



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Roy L. Skinner,) Case No. 01-11020C-7G
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ORDER

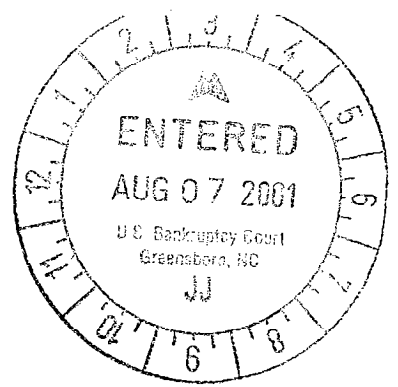
In accordance with the memorandum opinion filed contemporaneously herewith, the objection by the Trustee to Debtor's claim for property exemptions is overruled.

This 7th day of August, 2001.

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION



IN RE:

Roy L. Skinner,

Debtor.

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Case No. 01-11020C-7G

ORDER

In accordance with the memorandum opinion filed contemporaneously herewith, the objection by AmeriSource Corporation to Debtor's claim for property exemptions is overruled.

This 7th day of August, 2001.

William L. Stocks

WILLIAM L. STOCKS *William L. Stocks*
United States Bankruptcy Judge