




SO ORDERED.

SIGNED this 1st day of December, 2016.


BENJAMIN A. KAHN
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

In re:)
)
Janet Sue Lev,) Case No. 16-10659
)
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Debtor.)
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)

MEMORANDUM OPINION GRANTING
MOTION TO COMPEL TURNOVER OF PROPERTY

THIS CASE came before the Court for hearing on November 29, 2016, on the Motion to Compel Janet Sue Lev to Turnover Property of the Estate (the "Motion to Compel Turnover of Property") filed by Everett B. Saslow (the "Trustee") on October 21, 2016. At the hearing, Everett B. Saslow appeared as trustee, Janet Sue Lev (the "Debtor") appeared, Truman A. Barker appeared as attorney for the Debtor, and Sarah Bruce appeared on behalf of the Office of the Bankruptcy Administrator. For the reasons set forth herein, the Trustee's Motion to Compel Turnover of Property is GRANTED. This opinion shall constitute the Court's

findings of fact and conclusions of law under Bankruptcy Rule 7052.

Trustee moves the Court to compel the Debtor to turnover to the Trustee certain funds received as severance payments by the Debtor which the Trustee contends are property of the estate. Debtor filed an Objection [Doc. #23] to the Trustee's motion on November 14, 2016. On November 15, 2016, Debtor filed a Brief in support of her objection [Doc. #24] (the "Debtor's Brief"). The Debtor argues that the severance payments should be excluded from the Debtor's bankruptcy estate as post-petition wages or salary of the Debtor. Alternatively, if the Court finds the severance pay to be property of the estate, Debtor argues that she should be able to exempt these funds as unemployment compensation pursuant to N.C. Gen. Stat. § 96-17 and/or as wages necessary for the support of the Debtor and her dependents under N.C. Gen. Stat. § 1-362.

Facts

The Debtor commenced this case by filing a voluntary petition under chapter 7 of the United States Bankruptcy Code on June 29, 2016. Debtor's former employer, Bank of America, terminated the Debtor on March 7, 2016, over three months prior to the petition date.¹ Immediately prior to her termination, Debtor was offered a severance package from her employer under

¹ The severance agreement was signed on March 2, 2016.

which she could elect to receive a lump sum or installment payments.² Once Debtor elected either a lump sum or installments this election could not be changed. Debtor elected to receive installment payments due to the added benefit of continued healthcare coverage, among other things. During the duration of the installment payments, the severance payments will cease only if the Debtor is re-hired by Bank of America. Debtor filed her petition 114 days after signing the severance agreement and electing the installment payments, and 109 days after her termination. The severance payments received by the Debtor under the severance agreement are her main source of income.³ Therefore, the Debtor has expended the severance payments that she has received so far, including severance payments received post-petition. Although Debtor asserts that she would be entitled to claim an exemption in the severance payments, she has not claimed an exemption in her rights under the severance agreement or in the payments themselves.

Analysis

The Debtor argues that any severance payments received by the Debtor post-petition constitute wages, salary, or commission earned from services performed by the Debtor after the commencement of the case, and therefore are excluded from the

² The Court admitted the severance agreement into evidence at the hearing.

³ Debtor also receives income from renting one-half of her home to a tenant.

Debtor's bankruptcy estate under 11 U.S.C. § 541(a)(6). Section 541 defines property of the estate as follows:

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

* * *

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, *except such as are earnings from services performed by an individual debtor after the commencement of the case.*

11 U.S.C. § 541(a)(1) and (6) (emphasis added).

The Debtor's contractual rights under the severance agreement became property of the estate under section 541(a)(1). See 5 Collier on Bankruptcy ¶ 541.07[3] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) ("Collier's") ("The property accruing to the estate under section 541(a)(1) includes all rights of action the debtor may have arising from contract."). The severance payments accruing under those contractual rights would be "[p]roceeds, product, offspring, . . . or profits of or from" those contractual rights, unless they are excepted from property of the estate as earnings from "services performed by an individual debtor after the commencement of the case." 11 U.S.C. § 541(a)(1) and (6). The issue, therefore, is whether the post-petition remittance of the severance payments renders

those payments earnings for services performed by the Debtor after the commencement of the case. It does not.

Courts considering whether severance payments constitute earnings from post-petition services consider whether the payments are "sufficiently rooted in the pre-bankruptcy past" as to be included within the estate. See In re Jokiel, 447 B.R. 868, 872 (Bankr. N.D. Ill. 2011) (citing Rau v. Ryerson (In re Ryerson), 739 F.2d 1423 (9th Cir. 1984)). "Therefore, the key issue is whether the severance payment is 'rooted' in the Debtor's pre-petition or post-petition services." Id. In Jokiel, the debtor contended that his severance payments were excluded from his bankruptcy estate because he continued to work for four months post-petition, because the payments constituted compensation for his continuing agreement not to compete with his employer, and because of his post-petition release of all claims against his employer in exchange for the payments. Id. at 873-74. Despite the continued post-petition employment, the post-petition release, and the covenant not to compete, the court concluded that the severance payments were sufficiently rooted in the pre-bankruptcy past to constitute property of the estate. Id. at 872.⁴ The court specifically determined that an

⁴ Other Courts interpreting § 541(a)(6) similarly have concluded that severance payments to which a former employee becomes entitled pre-petition are not sufficiently rooted in post-petition services to exclude them from property of the estate even where the debtor has continuing personal obligations to her former employer. See e.g., In re LaSpina, 304 B.R. 814

agreement not to do something, i.e. not to compete and not to sue, did not constitute post-petition services. Id. at 873. See also In re Alstad, 265 B.R. 488, 490 (Bankr. M.D. Fla. 2001) ("Since the literal language of the statute does not entitle Debtor to an exclusion based on services not performed, the Court declines to extend the meaning of the statute to encompass such an interpretation.").

The severance payments to the Debtor in this case are even more rooted in the pre-bankruptcy past than those in Jokiel and LaSpina. Unlike in Jokiel, the Debtor's employment terminated more than three months pre-petition. The Debtor signed the severance agreement pre-petition, and made her election to receive a stream of payments prior to the petition date even though she could have taken a lump sum payment at that time. The Debtor has no continuing obligations whatsoever. The only continuing condition to her entitlement to receive the severance payments is her continuing to be unemployed by Bank of America. Of course, if she were re-hired by Bank of America, the severance payments would cease, and there would be no further payments to constitute property of the estate. The payments are not being rendered for any post-petition services as required by the statute merely because she only will receive them if she

(Bankr. S.D. Oh. 2004) (severance payments were not earned for services rendered post-petition even where the debtor has continuing obligations not to solicit employees, not to disparage, and not to disclose trade secrets).

remains unemployed by Bank of America. Therefore, the severance payments are entirely rooted in the pre-bankruptcy past and constitute property of the estate.

In support of her position that the severance payments constitute earnings for post-petition services, the Debtor relies upon Hoffman v. Bruneau (In re Bruneau), 148 B.R. 4 (Bankr. D. Conn. 1992). In Bruneau, the debtor's employer notified certain employees of the introduction of a program under which, on or before November 15, 1991, the employees could elect to voluntarily terminate their employment, and receive one year of base salary. Id. at 5. The employer could refuse any election based upon its needs, and any employee who failed to make the election would only be entitled to severance pay if terminated thereafter. Id. One week after filing her chapter 7 bankruptcy petition, the debtor notified her employer of her election to participate in the program. Id. Her employer accepted her election, and she thereby became entitled to 52 weekly payments equal to the debtor's base salary in exchange for a release of all claims including employment discrimination. Id. at 4. The trustee contended that the program payments were property of the estate because her right to participate in the program existed pre-petition and was based upon the debtor's pre-petition employment. Id. at 5.

The court in Bruneau was not considering severance payments to which the debtor was entitled pursuant to a pre-petition contract. Instead, the debtor in Bruneau became entitled to receive the compensation for voluntary separation only post-petition and in lieu of severance, and then only after she elected to terminate her employment and her employer accepted her into the program. Id. The court specifically distinguished In re Ryerson, 739 F.2d 1423 (9th Cir. 1984), in which the Ninth Circuit held that severance payments were property of the estate because, unlike the severance pay in this case and in Ryerson, the program payments in Bruneau were not "determined . . . by a pre-petition contract obligation." Id. at 6. Since the payments did not arise out of any pre-petition contractual right, they were not proceeds of property of the estate that would come into the estate under 11 U.S.C. § 541(a)(6) in the first place. The payments in Bruneau therefore did not need to fall within the exception in the latter clause of that section, and the opinion in Bruneau is unhelpful to Debtor's position.

Since the severance pay is ruled to be property of the estate, the Debtor's alternative argument is that she should be able to exempt these payments as unemployment compensation pursuant to N.C.G.S. § 96-17. At this time, the Debtor has not claimed this property as exempt. Therefore whether any portion of the severance may be claimed as exempt is not properly before

the Court. See Jokiel, 447 B.R. at 875 (where the debtor had not claimed an exemption in the severance pay other than in his reply to the trustee's motion for turnover, the issue of the exemption was not properly before the court because "[e]ven if property is subject to a valid exemption, it is not automatically removed from the estate . . . ; [rather, the debtor must claim the exemption]").

CONCLUSION

For the reasons set forth above, the Court will enter its Order granting the Trustee's Motion to Compel Turnover of Property, and further providing that the Trustee is entitled to receive any further severance payments directly from Bank of America upon providing a certified copy of the Court's Order to Bank of America. The Debtor remains enjoined from disposing of any remaining severance payments or the proceeds thereof under 11 U.S.C. § 362(a)(3). See In re Sayeh, 445 B.R. 19, 26 (Bankr. D. Mass. 2011) (the debtor's unauthorized removal of property of the estate constituted a violation of the automatic stay under 11 U.S.C. § 362(a)(3)); In re Sofer, 507 B.R. 444, 449-50 (Bankr. E.D.N.Y. 2014) (and cases cited therein).

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PARTIES TO BE SERVED

Janet Sue Lev
2111 Arbrook Lane
High Point, NC 27265

Truman Andrew Barker
Cecil & Cecil, P.A.
223 N. Lindsay Street
High Point, NC 27360


Everett B. Saslow, Jr.
P. O. Box 989
Greensboro, NC 27402

William P. Miller
Bankruptcy Administrator
101 South Edgeworth Street
Greensboro, NC 27401



SO ORDERED.

SIGNED this 1st day of December, 2016.


BENJAMIN A. KAHN
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
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ORDER GRANTING
MOTION TO COMPEL TURNOVER OF PROPERTY

THIS CASE came before the Court for hearing on November 29, 2016, on the Motion to Compel Janet Sue Lev to Turnover Property of the Estate [Doc. #20] (the "Motion to Compel Turnover of Property") filed by Everett B. Saslow, Jr., as chapter 7 trustee (the "Trustee") on October 21, 2016. At the hearing, Everett B. Saslow appeared as trustee, Janet Sue Lev (the "Debtor") appeared, Truman A. Barker appeared as attorney for the Debtor, and Sarah Bruce appeared on behalf of the Office of the Bankruptcy Administrator.

For the reasons set forth in the Memorandum Opinion entered contemporaneously herewith, it is hereby ORDERED, ADJUDGED, AND DECREED as follows:

1. The Motion to Compel Turnover of Property is GRANTED;

2. The Debtor shall immediately turnover to the Trustee all severance payments (the "Severance Payments"), including but not limited to those payments from the severance agreement between the Debtor and Bank of America dated on or about March 2, 2016, a copy of which agreement was admitted into evidence at the request of the Debtor at the hearing on this matter (the "CSP Agreement"), and all proceeds of the CSP Agreement;

3. The Trustee shall be entitled to receive any further Severance Payments otherwise due and owing to the Debtor, including those coming due under the CSP Agreement, directly from Bank of America upon providing a certified copy of this Order to Bank of America; provided, that nothing herein shall be construed to release the Debtor from the obligation to turnover to the Trustee any payments received by her; and

4. The Debtor remains enjoined from expending, transferring, assigning, or otherwise disposing of any remaining severance payments or the proceeds thereof under 11 U.S.C. § 362(a)(3).

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PARTIES TO BE SERVED

Janet Sue Lev
2111 Arbrook Lane
High Point, NC 27265

Truman Andrew Barker
Cecil & Cecil, P.A.
223 N. Lindsay Street
High Point, NC 27360

Everett B. Saslow, Jr.
P. O. Box 989
Greensboro, NC 27402

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