

May 15, 2008

Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE CHRISTOPHER JOSEPH
SEFERYN,

Debtor.

BAP No. KS-07-094

MISSOURI BUILDING, LLC,

Appellant,

Bankr. No. 05-26556
Chapter 7

v.

ORDER AND JUDGMENT*

CARL R. CLARK, Trustee, and
CHRISTOPHER JOSEPH SEFERYN,

Appellees.

Appeal from the United States Bankruptcy Court
for the District of Kansas

Before McFEELEY, Chief Judge, McNIFF, and BOULDEN¹, Bankruptcy Judges.

McNIFF, Bankruptcy Judge.

Missouri Building, LLC (“Missouri Building”) appeals the bankruptcy court’s order: (1) denying Missouri Building’s motion for summary judgment objecting to the exemption of the Debtor’s Individual Retirement Account (“IRA”); and, (2) granting the Debtor’s cross-motion for summary judgment holding that the Debtor’s IRA is exempt. We affirm.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

¹ Honorable Judith A. Boulden, United States Bankruptcy Judge, United States Bankruptcy Court for the District of Utah, sitting by designation.

Background

Christopher Joseph Seferyn (“Debtor”) filed for Chapter 7 bankruptcy relief on October 14, 2005, listing as an asset: “Bank of Onaga IRA” with a value stated at \$1,127,340.50. APPX to Brief of Appellant (“APPX”) at A27. The Debtor claimed this asset as exempt on Schedule C, pursuant to Kansas exemption law. APPX at A29. Missouri Building, a judgment creditor, filed its Proof of Claim on February 28, 2006, as an unsecured creditor in the amount of \$96,686.84. APPX at 56. Additionally, Missouri Building filed its objection to the Debtor’s exemptions, including the Debtor’s exemption for the above stated IRA on January 4, 2006. APPX at A67. All other exemption issues were eventually withdrawn. Missouri Building filed its motion for summary judgment and supporting brief on December 14, 2006. APPX at A75. Debtor filed his Response of Debtor to Creditor Missouri Building, LLC’s Objection to Exemption and Cross Motion for Summary Judgment Regarding Exemption of IRA on February 7, 2007. APPX at A156. Missouri Building did not respond to Debtor’s cross motion.

Missouri Building offered the following uncontroverted facts. The Debtor and Vincent Rook (“Rook”) were employed by Volo Holdings and were its only employees. Volo Holdings created an Employee Stock Ownership Plan (“ESOP”) on December 19, 2000, as a retirement benefit for its employees. Volo Holdings paid some of Debtor’s basic living expenses as part of his salary. On March 13, 2002, the IRS issued a favorable determination letter stating that the ESOP plan was properly qualified based upon the information supplied by Volo Holdings. APPX at A90 The Debtor and Rook were the only employees to participate in the ESOP. In 2004, the IRS published Revenue Ruling 2004-4 (“Rev. Ruling”). At that time, Debtor and Rook each owned fifty percent of the shares of the ESOP and were the only shareholders. On December 31, 2004, the Debtor liquidated the ESOP and rolled the funds into the IRA established for the Debtor and held at the

First Trust Bank of Onaga.

In addition to the uncontroverted facts that Missouri Building relied upon, the Debtor submitted and relied upon additional facts when he submitted his cross-motion for summary judgment. These additional material facts include: (1) Debtor's IRA started as a rollover from the ESOP; (2) the ESOP was formed in compliance with federal and state law; (3) Debtor contributed stock to the ESOP; (4) the ESOP did not loan money to the Debtor or the other employee, Mr. Rook; (5) the ESOP did not pay any of Debtor's living expenses; (6) the ESOP filed all proper reports with the Department of Labor and had an official annual meeting; (7) the assets of the ESOP were liquidated and rolled over into the IRA; (8) Debtor initiated the rollover plan because the IRS made a determination that in the future, there might be negative tax ramifications for ESOPs; (9) Debtor relied on the advice of his attorneys in liquidating the assets and rolling the assets over to the IRA; (10) the IRA was set up through the Debtor's attorneys; and (11) the bank sent a letter approving the rollover and sends quarterly and annual statements. Missouri Building did not object to nor did it contest these statements as it did not respond to the Debtor's cross motion.

On August 13, 2007, the bankruptcy court entered its Memorandum Opinion and Order Denying Objection to Exemption of IRA accompanied by the Judgment Denying Objection to Exemptions. APPX at A179, A193. Missouri Building timely filed its appeal.

Jurisdiction and Standard of Review

The Bankruptcy Appellate Panel has jurisdiction to hear appeals from final judgments within this circuit. 28 U.S.C. § 158(a)(1) & (b)(1). The parties have not chosen to have this appeal heard by the United States District Court for the District of Kansas; therefore, they are deemed to have consented to jurisdiction of the Bankruptcy Appellate Panel. 28 U.S.C. § 158(c)(1)(A) & (B); Fed. R. Bankr. P. 8001(e).

We review the bankruptcy court's decision on motions for summary judgment, *de novo*, applying the same standard as the district court. *See Trujillo v. Univ. of Colo. Health Sciences Ctr.*, 157 F.3d 1211, 1213 (10th Cir. 1998). Summary judgment is appropriate only if the pleadings, discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Bankr. P. 7056 incorporating Fed. R. Civ. P. 56(c). A party claiming relief may move, with or without supporting affidavits, for summary judgment. Fed. R. Bankr. P. 7056(a). A fact is "material" if, under the governing law, it could have an effect on the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute over a material fact is "genuine" if a rational jury could find in favor of the nonmoving party on the evidence presented. *Id.*

The moving party has the burden of showing that no genuine issue of material fact exists. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998). In considering a motion for summary judgment, the court draws all reasonable inference in favor of the nonmoving party. *See Curtis v. Okla. City Pub. Sch. Bd. of Educ.*, 147 F.3d 1200, 1214 (10th Cir. 1998). If no genuine issue of material fact is in dispute, the court then determines whether the substantive law was correctly applied. *Kaul v. Stephan*, 83 F.3d 1208, 1212 (10th Cir. 1996). If a movant does not bear the burden of persuasion on a claim, the movant may satisfy its initial burden by pointing out that the record lacks substantial evidence to support a necessary element of the nonmovant's claim. 11 James Wm. Moore, *Moore's Federal Practice - Civil* § 56.13(1) (3d ed. 2007) (citing *Celotex Corp v. Catrett*, 477 U.S. 317, 324-26 (1986)). A party in interest may file an objection to a properly claimed exemption and has the burden of proving that the exemption was not properly claimed. Fed. R. Bankr. P. 4003(b) and (c).

Discussion

Missouri Building's Motion for Summary Judgment Objecting to Debtor's Exemption

Upon review, it does not appear that any genuine issue of material fact alleged by and relied on by Missouri Building is in dispute, leaving this Court to determine whether the substantive law was correctly applied by the bankruptcy court.

Missouri Building objected to the Debtor's claim of an exemption in the Bank of Onaga IRA alleging, "[u]pon information and belief, the assets [do] not appear to be properly placed within and subject to protection of an IRA." APPX at A67. In its motion for summary judgment, Missouri Building argued (1) that the Debtor's ESOP did not qualify under the appropriate section of the IRS code; and, (2) because the ESOP did not comply, the funds rolled over from the ESOP into the IRA also did not qualify as a retirement plan for exempt status, pursuant to Kansas Statute § 60-2308. Specifically, Missouri Building argues that the ESOP was not a qualified retirement plan as it did not comply with the Rev. Ruling. Missouri Building did not cite any other statute or rule to support its objection to the exemption.

Missouri Building presents a number of arguments that the ESOP was not qualified pursuant to the Rev. Ruling. First, Missouri Building alleges that the creation and operation of the Debtor's ESOP paralleled "Situation 1" described in the Rev. Ruling in that there was not a separation between the stockholders, as owners of the business, and the ESOP. The ESOP stockholders controlled and distributed the ESOP assets at their discretion; therefore the ESOP was not qualified. Missouri Building also alleged that in addition to the Debtor's ESOP not qualifying for favorable tax treatment under the Rev. Ruling as there were less than 10 stockholders, the Debtor was disqualified because the Debtor owned 50 percent or more of the shares of the ESOP. The years that the Debtor owned

50 percent or more of the shares of the ESOP would be considered non-allocation years and subject to an excise tax penalty. Finally, Missouri Building alleged that the Rev. Ruling established a grace period to correct qualification issues as of March 15, 2004, and that the Debtor failed to meet this deadline, as the Debtor's ESOP was not timely transferred to the IRA.

The facts that Debtor presented and relied upon do not support these arguments. A revenue ruling is an "official interpretation by the IRS of the proper application of the tax law to a specific transaction. Revenue Rulings carry some authoritative weight and may be relied on by the taxpayer who requested the ruling." *Blacks Law Dictionary* 1320 (8th ed. 2004). Missouri Building did not present any evidence that indicates that the Rev. Ruling was requested by the Debtor or specific to a transaction by the Debtor or Debtor's employer, Volo Holdings.

If the Rev. Ruling does apply as persuasive authority, the material facts relied upon by Missouri Building do not support the argument that the shareholders controlled and distributed funds from the Debtor's ESOP. The uncontroverted facts were that the Debtor and Mr. Rook were the sole employees of Volo Holdings. Volo Holdings created the ESOP. Volo Holdings paid part of Debtor's basic living expenses as part of his salary. The IRS issued a favorable determination letter specific to the ESOP established by Volo Holdings in its organizational form at the time of creation. Missouri Building did not present evidence that the ESOP was established and administered in any way other than the way initially approved by the IRS.

Missouri Building did not submit facts or authority to support its allegation that the Debtor was unqualified because he owned more than 50 percent of the shares of the ESOP. The fact submitted and relied upon by Missouri Building was that the Debtor owned 50 percent of the shares of the ESOP. As for the excise tax penalty allegation, Missouri Building did not provide facts or authority

to support the allegation.

Missouri Building cited a “grace period” in the Rev. Ruling for corrective actions to be taken. The Rev. Ruling states, “[s]ection 409(p) is effective for plan years beginning after December 31, 2004.” *Rev. Ruling* at 4, *in* APPX at A101. The Debtor’s ESOP was liquidated and rolled into the IRA on December 31, 2004. The Rev. Ruling further states, “[Section] 409(p) of the Code is effective for plan years ending after March 14, 2001 for an ESOP that is established after that date[.]” *Id.*, *in* APPX at A102. The Debtor’s ESOP was established prior to that date on December 19, 2000. The deadlines cited by Missouri Building did not apply to the Debtor’s ESOP. The Rev. Ruling is not persuasive as an authority to determine that the Debtor’s ESOP was not qualified.

Missouri Building alleges that the ESOP was not a qualified plan pursuant to *In re Feldman*, 171 B.R. 731 (E.D.N.Y. 1994). In that case, the Bankruptcy Court for the Eastern District of New York found that the debtor’s plan was not a qualified top-heavy plan and therefore not exempt from the bankruptcy estate. In the case before this court, Missouri Building did not provide facts or authority that the Debtor’s ESOP was a top-heavy plan, qualified or not.

Missouri Building also cited *In re Hipple*, 225 B.R. 808 (Bankr. N.D. Ga. 1996). In that case, that debtor’s exemptions were upheld. There is nothing in *Hipple* that would allow this Court to determine Debtor’s ESOP is not qualified.

The Debtor responded to Missouri Building’s motion for summary judgment arguing that Missouri Building did not meet its burden and provide facts or authority establishing that the Debtor’s IRA was not exempt. As discussed above, we agree. Drawing all reasonable inferences in favor of the nonmoving party, Missouri Building failed to meet its burden that the Debtor’s ESOP was not qualified.

As Missouri Building did not meet its burden that the ESOP was not qualified, it is not possible to analyze Missouri Building’s second argument, that

because the ESOP funds were not qualified then the funds deposited into the IRA were not qualified. Missouri Building has not established, by the pleadings or materials submitted, that the Debtor's IRA was not exempt. The bankruptcy court did not commit error in denying Missouri Building's motion for summary judgment.

Debtor's Cross Motion for Summary Judgment Regarding Exemption of IRA

Again, the Bankruptcy Code requires that a court render a judgment if the pleadings, the discovery and disclosure materials on file, and any affidavits, show that there is not a genuine issue as to any material facts and the movant is entitled to judgment as a matter of law. Fed. R. Bankr. P. 7056 incorporating Fed. R. Civ. P. 56(c). If a movant does not bear the burden of persuasion on a claim, the movant may satisfy its initial burden by pointing out that the record lacks substantial evidence to support a necessary element of the nonmovant's claim. 11 James Wm. Moore, *Moore's Federal Practice - Civil* § 56.13(1) (3d ed. 2007) (citing *Celotex Corp v. Catrett*, 477 U.S. 317, 324-26 (1986)).

The commencement of a bankruptcy case creates an estate that is comprised of all of a debtor's legal or equitable interests in property as of the date of filing. 11 U.S.C. § 541(a) (2005). A debtor may exempt property from the estate. 11 U.S.C. § 522 (b) (2005). Kansas opted out of the federal exemptions and enacted its own exemption scheme regarding an IRA, pursuant to K.S.A. § 60-2308(b), as stated, in part, below:

“[A]ny interest of any participant or beneficiary, in a retirement plan which is qualified under sections 401(a), 403(a), 403(b), 408, 408(A) or 409 of the federal internal revenue code of 1986 and amendments thereto shall be exempt from any and all claims of creditors of the beneficiary or participant.”

Kan. Stat. Ann. § 60-2308(b) (2002).

The Debtor argued in his cross motion for summary judgment that Missouri Building did not present evidence that the ESOP was improperly established or administered to disqualify the IRA as exempt. On the contrary, the Debtor

provided, through the favorable determination letter from the IRS, evidence that the ESOP was a qualified plan at the time it was created. *March 13, 2002, Letter from IRS to Volo Holdings, in APPX at A90.* Debtor further provided the letter of its expert, Renkemeyer, Campbell & Weaver, LLP, the debtor's tax attorneys, as evidence that the ESOP was properly administered. *December 1, 2005, Memorandum from Renkemeyer, Campbell & Weaver, LLP to Trustee of the United States Bankruptcy Court, Eastern District of Kansas, in APPX at A95.* The letter had initially been submitted to the panel trustee as an explanation of the creation, administration and liquidation of the ESOP. The letter, which Missouri Building did not oppose, and in fact submitted with its memorandum, stated that the ESOP was formed in compliance with all federal and state laws. Additionally, the letter stated that the ESOP funds were rolled over into the IRA, from one "qualified plan to another." *Id., in APPX at A97.*

The Debtor argued that Missouri Building did not present facts or evidence to support its allegation that the ESOP funds were commingled with the business funds or assets transferred indiscriminately by the shareholders and failed to meet its burden of providing proof of an essential element of its claim.

Finally, the Debtor argued that Missouri Building's interpretation of the Rev. Ruling was incorrect. Debtor relied upon the expert opinion of Debtor's tax attorneys in the above mentioned letter, who summarized the ruling for the panel trustee, explaining that the Rev. Ruling indicated that the tax benefits to Debtor's ESOP could be affected in the future and corrective action was taken. The Debtor also provided facts within that same letter that Missouri Building's interpretation of the grace period was incorrect.

The Debtor argued in his cross-motion for summary judgment that the IRA created and maintained with the Bank of Onaga was qualified under the federal IRS code; the funds were deposited into the IRA prior to the Debtor filing for bankruptcy, therefore Kansas exemption law would apply and exempt the IRA

funds from any and all creditor's claims or from the bankruptcy estate. The Debtor referenced the letter from his tax attorney that was provided to the bankruptcy trustee, explaining the creation and administration of the ESOP and subsequent rollover of the ESOP into the IRA. This letter was provided to Missouri Building during discovery and attached to Missouri Building's memorandum in support of its motion for summary judgment. The letter states that "assets were transferred directly from one qualified plan to another," (*id.*, in APPX at A97), referring to the assets from the ESOP that were transferred into the IRA.

Debtor provided material facts that show that the funds were deposited in a qualified IRA prior to the date that the Debtor's bankruptcy petition was filed. The Debtor provided evidence, i.e., the favorable determination letter from the IRS and the letter from his tax attorneys, showing that the ESOP was a qualified plan upon its creation and throughout its existence until liquidated and rolled into the IRA plan.

The Debtor, as the movant, does not have the burden of persuasion in determining if the IRA is exempt. The Debtor's burden is to show that the record lacks substantial evidence to support a necessary element of Missouri Building's claim that the IRA is not exempt. Missouri Building did not respond to Debtor's cross-motion for summary judgment and the additional facts relied upon by the Debtor, therefore did not provide substantial evidence to support its objection to the exemption of the IRA. The Debtor has met his burden. The bankruptcy court's order granting the Debtor's cross-motion for summary judgment disallowing Missouri Building's objection was not in error.

Conclusion

Missouri Building failed to meet its burden that the Debtor's exemption should be denied as a matter of law pursuant to Federal Rule of Bankruptcy Procedure 7056. The order denying the request for summary judgment is

affirmed.

The Debtor met his burden to overcome Missouri Building's objection to the Debtor's exemption of the IRA. The order exempting the IRA pursuant to Kansas Statute § 60-2308 is affirmed.