

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

In re:

Case No. : 04-35831-BKC-PGH

Nicholas Joseph Lapi
and
Lisa Michelle Lapi

Chapter 7

Debtors.

ORDER OVERRULING TRUSTEE'S OBJECTION TO CLAIMED EXEMPTIONS AND
APPLICATION FOR TURNOVER

THIS CAUSE came before the Court on June 8, 2005, for an evidentiary hearing on Michael Bakst's (the "Trustee") Objection to Claimed Exemptions and Application for Turnover (the "Objection"). With the Court having considered the arguments of counsel, memoranda of law, and testimony of witnesses, and being otherwise fully advised in the premises, the Objection is hereby **OVERRULED**.

Findings of Fact

The Debtors, Nicholas Joseph Lapi (the "Debtor") and Lisa Michelle Lapi (collectively the "Debtors"), filed a voluntary Chapter 7 bankruptcy proceeding on December 22, 2004. Among the items listed on the Debtors' schedules were bank accounts, household goods, furniture, sports equipment, and other personal property. However, the Debtors did not list Mr. Lapi's right to receive an employment bonus on Schedule B. At his Rule 2004 examination, the Debtor testified that he received a \$20,000.00 employment bonus from his employer, Professional Planners Marketing

Group ("Professional Planners"), on January 27, 2005. On February 23, 2005, the Trustee filed his Objection to Exemptions and Application for Turnover in order to reclaim the bonus proceeds as property of the estate.

Professional Planners is an independent wholesaler of insurance and financial services. The Debtor has worked at Professional Planners as an annuity sales manager since 2004. The Debtor does not have a written employment contract with Professional Planners. In addition, Professional Planners does not have a written policy explaining the terms and criteria of potential bonuses that it may pay to its employees.

The Debtor's testimony from his Rule 2004 examination indicates that he thought his bonus was based on his performance for the 2004 year. He further testified in Court that he knew that it was possible that he would receive a bonus when he began his employment with Professional Planners. He also thought that he needed to be employed and in good standing with Professional Planners when the bonus was awarded in order to receive it. He testified that he understood the bonus to be performance-based, but that his employer, Anthony Lampert ("Mr. Lampert"), would be able to explain the criteria for the award.

Mr. Lampert testified at the hearing that Professional Planners did not have a written contract with the Debtor that explained the terms of his employment or the criteria for awarding

bonuses. He explained that the bonus paid to the Debtor was based purely on his discretion and that of his partner as the principals of Professional Planners. Mr. Lampert testified that he and the Debtor did not have a conversation about the bonus before it was awarded. He explained that the bonus was awarded in part to say "nice job" for the Debtor's year 2004 performance, but also as an incentive to continue his positive performance in the forthcoming year. Mr. Lampert testified that the bonus had nothing to do with Professional Planner's profit or income from 2004, and that if the bonus had been for 2004 it would have been paid in 2004. When asked if the Debtor would have received the bonus if he had quit or been terminated at the end of 2004, Mr. Lampert replied, "Absolutely not!"

Conclusions of Law

The Court has jurisdiction over this issue pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b) (2) (B). This is a proceeding to determine property of the estate pursuant to 11 U.S.C. § 541(a) (1) and(6).

The Debtor argues that the bonus is exempt from becoming property of the estate because it was earned postpetition. The Debtor argues that his eligibility to receive the bonus depended on his continued employment with Professional Planners and that his employer had sole discretion to award the bonus upon any criteria and at any time that he saw fit. The Debtor maintains

that he could have forfeited the bonus by quitting or being terminated at any time prior to his actual receipt of the funds. Therefore, the Debtor concludes that the bonus was contingent on his postpetition employment and continued service with the company.

The Trustee argues that the bonus is property of the estate because it was awarded for the Debtor's year 2004 performance with Professional Planners. The Trustee argues that it is irrelevant that the bonus was awarded after the petition was filed, and that the Debtor had no guaranteed right to the bonus. The Trustee dismisses the Debtor's argument as analogous to an attempt by a debtor to retain the proceeds of a tax return for a return filed postpetition. The Trustee argues that courts have rejected such attempts, and the Debtor is trying to employ a similar tactic in this case merely by highlighting that the bonus was discretionary and received postpetition.

The issue before the Court is whether the bonus is exempt from property of the estate as income earned postpetition or whether it was awarded based on the Debtor's prepetition, year 2004, performance. For the reasons that follow, the Court finds that the bonus is not property of the estate because it was awarded to the Debtor based on his postpetition performance and continued employment with Professional Planners.

The Bankruptcy Code provides that "the commencement of a

case under section 301, 302, or 303 of this title creates an estate." 11 U.S.C. § 541(a). The property of the bankruptcy estate is comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case."

11 U.S.C. § 541(a)(1). The legislative history of § 541(a) reveals that the section's purpose is to include in the estate all kinds of property whether tangible or intangible including "anything of value that the debtors have into the estate." *In re Edmonds*, 263 B.R. 828, 829 (E.D. Mich. 2001) (citing H.R.Rep. No. 95-595, at 176 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6136). The estate also includes "[p]roceeds, 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)(6).

"The determination as to whether a debtor's interest in property is property of the bankruptcy estate is a question of federal law." *Booth v. Vaughan (In re Booth)*, 260 B.R. 281, 285 (B.A.P. 6th Cir. 2001). State law generally controls the question of whether the debtor has an interest in property. *Id.* (citing *Butner v. United States*, 440 U.S. 48, 55 (1979)). The Supreme Court has held that a contingent interest in property could still count as property of the estate. *Segal v. Rochelle*, 382 U.S. 375, 379 (1966). The Debtor's interest in the bonus at the filing of

the petition was a contingent interest.¹ According to his employer, the bonus was contingent on the Debtor's continued employment with the company as well the employer's discretion.

The Trustee cites *Daly v. Soboslai (In re Soboslai)*, 263 B.R. 700 (Bankr. D. Conn. 2001) and *In re Booth*, 260 B.R. at 291, to support his position that the bonus is property of the estate. In *Soboslai*, the court addressed the issue of whether a bonus paid to an attorney based on prepetition services, which was paid postpetition, should be considered property of the estate. *In re Soboslai*, 263 B.R. at 701. The Debtor was a "member" of a law firm that consistently paid year-end bonuses. *Id.* Although the debtor was a member of the firm, he was not issued any stock in the firm and was not on the Board of Directors that had discretion to grant firm bonuses. *Id.* at 702. The Board of Directors made its decision on the size of the bonus to be issued "after consideration of the contributions of each member to the Firm over the preceding year." *Id.*

In *Soboslai*, bankruptcy court held that the debtor's bonus was attributable to services the debtor performed for the law firm over the course of the entire 1997 calendar year. *Id.* at 703. The court further held that because the debtor filed his

¹ See *Parrish v. General Motors Corp.*, 137 So.2d 255, 258 (Fla. Dist. Ct. App. 1962) (mere possibility of bonus without more cannot be regarded as condition of employment conferring a right enforceable at law). Neither party contests that the Debtor had a contingent interest in the bonus prior to filing his petition.

petition on October 15, 1997, it would prorate the bonus so that the portion earned for labors performed prior to the petition date would be turned over to the trustee. *Id.* The portion of the bonus that the debtor earned before filing the petition was property of the estate. *Id.*

The Trustee also cites *In re Booth*, 260 B.R. at 291, to support his argument that the bonus is property of the estate. In *Booth*, the debtor received distributions from a corporate profit sharing plan after he filed his bankruptcy petition. *In re Booth*, 260 B.R. at 284. The debtor filed his petition on September 17, 1999, and received the distributions on March 3, 2000. *Id.* To receive profit sharing distributions under the program, the debtor's company, DaimlerChrysler, was required to have profits for the year and the debtor-employee must have been employed by the company at the end of the year. *Id.* The debtor argued that he either had no prepetition interest in the profit sharing plan or that his interest was only a beneficial interest in a trust. *Id.* The Bankruptcy Court for the Northern District of Ohio held that the portion of the profit sharing plan that the debtor earned prepetition was property of the estate. *Id.* at 283. The Bankruptcy Appellate Panel of the Sixth Circuit ("BAP") affirmed. *Id.*

The BAP agreed with the Bankruptcy Court that "the Debtor's profit sharing payment was sufficiently rooted in his prepetition

past to be included in property of his bankruptcy estate under § 541(a).” *Id.* at 290. The BAP held that prorating the award so that only the portion of the profit sharing that related to the debtor’s prepetition employment became property of the estate was “entirely appropriate.” *Id.* The BAP also likened the case to other cases that held that a debtor’s contingent interest is property of the estate.² *Id.* at 285-87.

²The BAP noted that in each of the following circumstances a contingent interest was held to be property of the estate:

A debtor’s contingent right to a postpetition employment termination payment under a prepetition employment agreement. *Rau v. Ryerson (In re Reyerson)*, 739 F.2d 1423 (9th Cir. 1984).

A debtor’s contingent interest in an earned income tax credit, even when the petition is filed before the end of the tax year. *Baer v. Jones (In re Montgomery)*, 224 F.3d 1193 (10th Cir. 2000) . . .

A debtor’s interest in her husband’s separately titled property that was contingent on the outcome of their pending divorce case. *In re Greer*, 242 B.R. 389, 396 (Bankr. N.D. Ohio 1999).

A debtor’s contingent claim against a third party. *Borock v. Mathis (In re Clipper Int’l Corp.)*, 154 F.3d 565, 567 (6th Cir. 1998) . . .

A debtor’s right to receive property, contingent on surviving others. *Neuton v. Danning (In re Neuton)*, 922 F.2d 1379 (9th Cir. 1990) . . .

A debtor’s interest in an earnest money deposit in an escrow account. *Turner v. Burton (In re Turner)*, 29 B.R. 628 (Bankr. D. Me. 1983).

An attorney debtor’s right to legal fees under a contingent fee agreement with a client. *Turner v. Avery*, 947 F.2d 772, 774

The BAP concluded the debtor had an interest in the profit sharing plan, and that the contingencies relied upon by the debtor, that the company had not yet declared a profit at the time of filing and that he could have been terminated before the end of the year, were indistinguishable from the many cases in which a contingent interest was held to be property of the estate. *Id.* at 287.

The Trustee argues that the holdings in *Soboslai* and *Booth* as well as a host of cases involving tax refunds³ dictate that a

(5th Cir. 1991) . . .

A debtor's contract right to commissions attributable to insurance policies sold prepetition, but paid postpetition, whether or not vested or contingent upon future services. *Williams v. Tomer (In re Tomer)*, 147 B.R. 461 (S.D. Ill. 1992) . . .

The debtor's right to a refund of a deposit made pursuant to a residential life use fee agreement, contingent on the debtor moving out of the residence before a stated time. *In re Thompson*, 253 B.R. 823, 825 (Bankr. N.D. Ohio 2000).

A debtor's interest in a stock option plan that is contingent on postpetition employment. *Stoebner v. Wick (In re Wick)*, 249 B.R. 900 (Bankr. D. Minn. 2000), *rev'd on other grounds*, 256 B.R. 618 (D. Minn. 2001) .

. . .

A debtor's future interest in lottery winnings. *In re Keim*, 212 B.R. 493 (Bankr. D. Md. 1997) . . .

In re Booth, 260 B.R. at 285-87.

³See, e.g., *Segal v. Rochelle*, 382 U.S. 375 (1966); *In re Lancaster*, 161 B.R. 308 (Bankr. S.D. Fla. 1993); *In re Dussing*, 205 B.R. 332 (Bankr. M.D. Fla. 1996); *In re Moody*, 241 B.R. 238 (Bankr. M.D. Fla. 1999).

right to funds "sufficiently rooted in the pre-bankruptcy past" is a contingent interest that is included in the property of the estate regardless of when the debtor actually receives the funds. The Trustee concludes that this case is identical to those cases that he cites because the Debtor received his bonus for performing prepetition services for his employer. Therefore, it is irrelevant that the bonus amount was determined and paid postpetition because it was awarded for his prepetition services.

The Debtor argues that *Sharp v. Dery*, 253 B.R. 204 (E.D. Mich. 2000), is directly on point. In *Sharp*, the debtor filed his petition on December 21, 1998, and received his employee bonus on February 22, 1999. *Sharp*, 253 B.R. at 206. The debtor's employer required that an employee must not have been fired or resigned during the plan year or before issuance of the bonus. *Id.* The company made exceptions for employees who retired, were disabled, or died during the fiscal year. *Id.* In addition, the employer had the right to amend, suspend, or terminate the bonus plan at any time. *Id.* The employer also had sole discretion over when to award the bonus checks. *Id.*

The bankruptcy court held that the employer had no discretion over the bonus amount and the debtor had a right to the bonus as of the petition date, so the bonus was property of the estate. *Id.* at 207. In reversing the bankruptcy court, the Eastern District of Michigan observed that it was insignificant

that the employer had no discretion over the *amount* of bonus to award, but what was significant was that the employer had discretion "*as to whether it would pay any bonus at all.*" *Id.* The court relied on the factors pronounced in *Vogel v. Palmer (In re Palmer)*, 57 B.R. 332 (Bankr. W.D. Va. 1986), in holding that the postpetition award of the bonus was property of the estate. *Sharp*, 253 B.R. at 207. The factors the court employed were: "(1) for the debtor to receive the bonus, the employer had to employ him at the time it declared the bonus; (2) 'to be eligible for the bonus, the debtor had to satisfactorily perform his job; and (3) payment of the bonus was solely at the employer's discretion." *Id.* Despite some minor semantic differences in the terms of the bonus plans, the court found that the debtor's bonus plan and the plan in *Palmer* shared a dispositive characteristic: "the employer, as of the date the debtor filed for bankruptcy, could have decided not to pay any bonus at all under the terms of the bonus plan itself." *Id.* (citing *In re Palmer*, 57 B.R. at 336-37.

In addition to finding that the employer had sole discretion over whether to award a bonus, the District Court found that the debtor had to put in an additional two months of labor after filing his petition in order to be eligible for his bonus pay. *Id.* at 208. The court concluded that his bonus depended on his continued services to his employer after the petition date;

hence, it could not constitute property of the estate. *Id.*

The Debtor's contingent interest in the bonus in this case more closely resembles the contingency in *Sharp* than those cases where an employee was entitled to a bonus at the completion of a calendar work year. In this case, the bonus does not constitute property of the estate because the Debtor was required to remain with Professional Planners until the bonus was awarded, and not merely until the end of the 2004 work year.

The Trustee points out that *Sharp* was criticized by the BAP in *Booth* for the district court's reliance on the issue of "whether [d]ebtor had an enforceable right to receive the bonus check when he filed his petition . . ." *In re Booth*, 260 B.R. at 290 (quoting *Sharp*, 253 B.R. at 207). The BAP was correct that determining whether the bonus was property of the estate should not have turned on whether the debtor had an enforceable right to receive the bonus when he filed his petition because the correct question under § 541(a)(1) is whether the debtor had any prepetition interest at all in the bonus or whether the bonus met the exception enumerated in § 541(a)(6). The *holding* in *Sharp*, however, rested on the court's finding that the debtor was required to perform an additional two months of postpetition labor to be eligible for the bonus. *Sharp*, 253 B.R. at 208.⁴

⁴The Court agrees with the Trustee that the court in *Sharp* should have prorated the bonus award to include in the property of the estate that portion of the bonus earned before the debtor

This case, however, turns on the issue of whether the Debtor's bonus was awarded for any of his prepetition labor with Professional Planners. The difference between this case and those cases cited by the Trustee is that in this case no portion of the Debtor's bonus was awarded for his prepetition labors. The Debtor's employer testified that the bonus was awarded in part to say "nice job" for 2004 and as an incentive to have a productive 2005 work year. However, the employer also testified that the bonus was not based on the company's 2004 profit or income and that he did not award the bonus to reward the Debtor for his 2004 performance. Most important, his employer testified that the Debtor would not have received anything had he quit or been fired prior to the bonus being distributed. The Debtor's continued employment with and performance for Professional Planners was the condition *sine qua non* of his receiving the bonus.

Because the bonus was awarded in part as consideration for the Debtor's postpetition labors for Professional Planners, the Court finds that the bonus constitutes "earnings from services performed by an individual debtor after the commencement of the case." 11 U.S.C. § 541(a)(6). Therefore, the Debtor's bonus is excepted from the property of the estate pursuant to § 541(a)(6).

Conclusion

The Debtor's bonus from employment with Professional

filed his petition.

Planners Marketing Group received on January 27, 2005, is excepted from the property of the estate pursuant to 11 U.S.C. § 541(a) (6) .

Order

It is hereby **ORDERED AND ADJUDGED** that:

1. The Trustee's Objection is **OVERRULED**.
2. The Debtor's bonus from employment with Professional Planners Marketing Group received on January 27, 2005, is **not** property of the estate.

Ordered in the Southern District of Florida on June 24, 2005.

Paul G. Hyman, Jr.
United States Bankruptcy Judge