

**United States Bankruptcy Court
District of New Mexico**

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re
Andrew Gregory Fresquez and
Debbie Ella Fresquez,
Debtors.

No. 7-03-11708 SS

**MEMORANDUM OPINION ON TRUSTEE'S OBJECTION
TO AMENDED CLAIM OF EXEMPTION**

This matter is before the Court on Trustee's Objection to Amended Claim of Exemption ("Trustee's Objection")(doc. 24), Debtor's Response thereto (doc. 30), Trustee's List of Cases for the Court's Consideration (doc. 38), Debtors' Response to Trustee's List of Cases (doc. 42) and Trustee's Response to Debtors' Discussion of the List of Cases (doc. 46). Trustee Yvette J. Gonzales appears through her attorney Arun A. Melwani. Debtors appear through their attorney Douglas Booth. For the reasons set forth below, the Court finds that the Trustee's Objection should be sustained and the Debtors should be denied their exemption in the subject asset.

The parties stipulated that the Court should base its decision on the pleadings, and in their response to Trustee's Objection Debtors admitted certain facts:

1. Trustee's Objection was timely filed.
2. The Trustee's Objection is to the Debtors' amended claim of exemption in the amount of \$16,790 in cash proceeds pursuant to 11 U.S.C. section 522(d)(5). The funds were

derived from the pre-petition sale of Andrew Fresquez's parents' residence.

3. Mr. Fresquez received his one-sixth interest in funds totaling \$23,425 from the sale.
4. Debtors were denied their discharge on July 31, 2003 pursuant to 11 U.S.C. section 727(a) because the Debtors had failed to disclose the cash proceeds of \$23,245 from the interest in the residence.
5. In their Response, Debtors claim that the funds have been expended and are no longer available for distribution to creditors.
6. Debtors also state that "unbeknownst to [them], the bulk of the funds in question would have been fully exempted in their bankruptcy."

Debtors filed their Chapter 7 petition on March 5, 2003. The Court reviewed the docket sheet in this case, and finds that the Debtors amended their Schedules B, C and Statement of Financial Affairs on October 30, 2003, about three months after their discharge was denied. The Court reviewed the original statements and schedules, and the amended statements and schedules. Debtors' amended Schedule B lists \$23,425 of "cash on hand" that was not on the original Schedule B, which listed \$10 of "cash on hand." Debtors' Amended Schedule C

attempts to exempt \$16,790 of the "cash on hand." The Amended Statement of Financial Affairs, Question 10, discloses the sale of 1/6th interest in Santa Fe real estate on February 17, 2003 (about two weeks before the Chapter 7 was filed), from which the Debtors received \$23,425.

Debtors' priority debt is \$1,046 (Schedule E) and nonpriority unsecured debt is \$28,862 (Schedule F), for a total of about \$30,000. The Court finds that the magnitude of the omission speaks for itself. It is an amount that is 75% of the total unsecured debt, so is certainly material. The timing also suggests that Debtors knew when they filed the petition they were entitled to the money. It is inconceivable that, in just two weeks time, they could have forgotten or overlooked a sale of this magnitude. The Court finds that Debtors intended to omit the asset, and filed their statements and schedules in bad faith.

Trustee relies on four cases for her position: Calder v. Job (In re Calder), 973 F.2d 862 (10th Cir. 1992); Kestell v. Kestell (In re Kestell), 99 F.3d 146 (4th Cir. 1996); In re Park, 246 B.R. 837 (Bankr. E.D. Tex. 2000); and In re St. Angelo, 189 B.R. 24 (Bankr. D. R.I. 1995). Debtors, in their Response, attempt to factually distinguish all four cases. However, cases of this type, which deal with bad faith issues,

must all be based on an individual analysis of each specific situations. The general rules to be learned from Trustee's cases are that 1) generally, schedules may be amended by Debtors at any time, although the amendment may be denied if there is bad faith by the Debtors, Calder, 973 F.2d at 867¹; 2) the bankruptcy code authorizes courts to prevent the use of the bankruptcy process to achieve illicit objectives, Kestell, 99 F.3d at 149; and 3) Debtors may not exempt property which they knowingly concealed and failed to disclose to the trustee, Park, 246 B.R. at 840, and St. Angelo, 189 B.R. at 26. All of these cases teach that a debtor must deal openly, honestly, and completely with the bankruptcy system in order to receive its benefits, because bankruptcy is an equitable system and one who seeks equity must do equity. Also, the entire structure and operation of the bankruptcy system depend on full disclosure by debtors.

Debtors argue that because their discharge has been denied, all the creditors will be paid in full and suffer no

¹ "Even if the debtors could amend their schedules to claim the exemption, the mere fact that they can claim the exemption does not necessarily mean that they are entitled it (sic)." Knupfer v. Wolfberg (In re Wolfberg), 255 B.R. 879, 883 (9th Cir. B.A.P. 2000) aff'd 37 Fed.Appx. 891 (9th Cir. 2002)(Emphasis in original; footnote omitted.); accord, Wood v. Premier Capital, Inc. (In re Wood), 291 B.R. 219, 229 (1st Cir. B.A.P. 2003) (citing Knupfer v. Wolfberg); In re St. Angelo, 189 B.R. at 26.

hardship. Debtor's (sic) Response to Trustee's Objections to Amended Claim of Exemptions, at 1 (doc 30) ("Debtors' Response"). Of course this is not true; having a (nondischarged) claim against a debtor and getting paid are two different things, as the very process of bankruptcy demonstrates. Debtors had the \$23,425 on hand on the day of the filing of the petition (Amended Schedule B, doc 20).² Even had they successfully exempted \$16,635 of that sum (and there is no reason to think they would not have, had they been honest), \$6,635 would have remained for distribution on the total priority and nonpriority unsecured claims, or roughly a 20% distribution. The creditors may never receive that dividend now if the Trustee is unsuccessful in recovering any of the funds that have been expended³ or otherwise collecting from the Debtors.

Debtors also argue that denial of the exemption would be punitive because their discharge has already been denied, a criminal referral was initiated, most of the property would

² What exactly happened to the funds afterward is not clear; the Debtors only recite that "[t]he funds in question have been expended so they are no longer available for distribution to creditors." Debtors' Response, at 1.

³ See § 549(a).

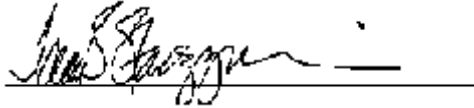
have been exempt in any event⁴, and the money is gone. None of these are valid or sufficient defenses to Trustee's objection.

Certainly there are cases in which the extent of the malfeasance is far larger. But that fact alone does not lessen the gravity of the Debtors' misbehavior in concealing and then secretly disposing of estate assets. This was not behavior which can at all reasonably be construed to have been accidental; the facts require a finding that the Debtors clearly must have had the specific intent to cheat their creditors when they initiated this bankruptcy process. Punishing this sort of intentional conduct is indeed punitive (by definition) but not overly so. Further the amount at issue, even taking into account the right to exempt most of it, would constitute a material recovery on a percentage basis of the unsecured claims. And it is important to note that the Debtors are not being denied all their exemptions, but only the one exemption (albeit in this case a significant one) that

⁴ This defense has been attempted before, unsuccessfully. See, e.g. Wood v. Premier Capital, Inc. (In re Wood), 291 B.R. 219, 226 (1st Cir. B.A.P. 2003) ("Generally, if a debtor intentionally conceals or fails to disclose estate property, the debtor will be barred from claiming such property as exempt, even if the property would have been exempt had it been properly scheduled and claimed.") (Citations omitted). See also In re Park, 246 B.R. 837, 840 (Bankr. E.D. Tex. 2000) (Same.)

relates directly to their illegal concealment, so it is specifically targeted to the misbehavior.

An appropriate order will be entered sustaining the Trustee' objection to Debtors' amended exemptions.



Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on October 5, 2004, a true and correct copy of the foregoing was either electronically transmitted, faxed, delivered, or mailed to the listed counsel and parties.

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