

U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: 07-04008

ORDER DENYING TRUSTEE'S OBJECTION TO AMENDMENT OF SCHEDULE C

The relief set forth on the following pages, for a total of 9 pages including this page,
is hereby ORDERED.

FILED BY THE COURT
06/02/2008



Entered: 06/04/2008

A handwritten signature in black ink, appearing to read "S. R. O.", written over a horizontal line.

US Bankruptcy Court Judge
District of South Carolina

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA**

IN RE:

Ronald Eugene Averette Sr.,

Debtor(s).

C/A No. 07-04008-DD

Chapter 13

ORDER

THIS MATTER is before the Court on the Chapter 13 trustee's ("Trustee") Objection to Ronald Eugene Averette's ("Debtor") amendment to Schedule C – Property Claimed as Exempt, filed in this bankruptcy case. A hearing was held in this matter on April 21, 2008. Debtor and Trustee appeared by and through counsel. Debtor's amendment to Schedule C was in conjunction with a motion to sell his residence. Debtor's motion was granted by separate order and the proceeds of sale are being held in escrow pending this order.

Facts

Debtor filed for relief under Chapter 13 of the Bankruptcy Code on July 31, 2007. Debtor filed the required lists, schedules and statements with his petition. Schedule A indicates Debtor owns a ½ interest in real property located at 518 South Coit Street, Florence, SC. Schedule A further indicates that Debtor uses this property as his primary residence. Debtor estimated the value of the property as \$103,000 with an encumbrance of approximately \$87,000. Schedule C did not claim an exemption in the homestead but rather an exemption in cash. Debtor's chapter 13 plan proposed to pay the trustee \$600 per month for 60 months. The plan states that unsecured creditors will receive not less than 1% of claims as a dividend. It appears that unsecured creditors will receive a distribution of \$20,000 or more, for a dividend of approximately 30% on the claims.

The original plan was confirmed by order of this Court entered October 1, 2007. On March 7, 2008, Debtor filed an amended Schedule C and an application to sell his residence to a third party for \$96,000.00. Amended Schedule C substituted a homestead exemption for the previously claimed cash exemption. South Carolina's exemption scheme, mainly codified in Code § 15-41-10 *et. seq.* (some exemption statutes are found in other sections of the Code), provides a choice of an exemption in cash or an exemption in a debtor's homestead, but not both. *See SC Code Ann. §§ 15-41-30(1) and (5).* Trustee filed a response to Debtor's Motion to Sell on March 20, 2008 and objected to the amendment to Schedule C, asserting that Debtor could not amend Schedule C without showing excusable neglect.

Arguments of the Parties

Trustee argues that Schedule C is not freely amendable, and that the interplay of Federal Rules of Bankruptcy Procedure 1009(a), 4003(a), and 9006 requires a motion to amend Schedule C. Permission to amend, Trustee contends, is predicated on proof that the choice of exemption was a mistake, and the choice of exemption was based on excusable neglect. Basically Trustee asserts that a debtor cannot choose one exemption and later elect a different exemption simply because circumstances change and make the new exemption more appealing. The Trustee argues that once a conscious choice is made of a particular exemption it cannot later be changed. Debtor asserts that Fed. R. Bankr. P. 1009 allows a debtor to freely amend his or her petition, schedules, lists, or statements at anytime before the case is closed.

Discussion

The Bankruptcy Rules provide the framework for claims of exemption in a bankruptcy case. "A debtor shall list the property claimed as exempt under § 522 of the

Code on the schedule of assets required to be filed by Rule 1007.” Fed. R. Bankr. P. 4003(a). The time for objection to a claim of exemption is limited to 30 days after the meeting of creditors is concluded and to 30 days after “any amendment to the list or supplemental schedules is filed. . . .” Fed. R. Bankr. P. 4003(b)(1). While the Rule provides a mechanism for an extension of time for objections, the deadline to object, as extended, is absolute. *Taylor v. Freeland & Kronz*, 112 S.Ct. 1644 (1992).

I. Federal Rule of Bankruptcy Procedure 1009

Fed. R. Bankr. P. 1009(a) states,

(a) General right to amend. A voluntary petition, list, schedule or statement may be amended by the debtor as a matter of course at any time before the case is closed. The debtor shall give notice of the amendment to the trustee and to any entity affected thereby. On motion of a party in interest, after notice and a hearing, the court may order any voluntary petition, list, schedule or statement to be amended and the clerk shall give notice of the amendment to entities designated by the court.

Trustee’s memorandum in support of the objection states her argument in the following way:

Rule 1009, Amendments, accords a debtor a general right to “move” for an amendment to a previously filed schedule or other filing. The use of the term “may” indicates the statute is permissive and not mandatory and says nothing about whether the amendment is to be allowed. The statutory provisions that the party “shall” give notice to the trustee and any party in interest, and phrase that the court “may order any [document] ... to be amended...”, Rule 1009(a), suggests the right to amendment is not absolute and whether an amendment is allowed is a discretionary determination by the bankruptcy judge.

Memorandum in support of objection to amendment – Document #20.

Trustee offers no case law or secondary authority to support this argument and the Court has been unable to locate a case that stands for this proposition. Furthermore, the Court believes the plain language of Fed. R. Bankr. P. 1009(a) does not support Trustee’s argument. A close reading of Fed. R. Bankr. P. 1009(a) reveals that it deals with two

separate situations. The first concerns amendments by a *debtor* which are allowed “as a matter of course at any time before the case is closed.” The second concerns amendment requested by “a party in interest” and requires a motion, notice and a hearing. If a party in interest files a motion, the Court, after notice and hearing, may order amendment of the petition, schedules, lists, or statements.

The Trustee argues that the phrase “may be amended by the debtor” gives the debtor “a general right to ‘move’ for an amendment.” This argument is premised on the commingling of the two situations dealt with in Rule 1009, when it is clear from the Rule that each clause is directed toward a different entity. The word “may” in the first clause references an amendment by right. The second occurrence of the word “may” relates to the court and accords the court discretion to order an amendment when appropriate.

II. Interaction of Federal Rules of Bankruptcy Procedure 1009(a) and 4003

Based on Trustee’s reading of Rule 1009(a), that a debtor has “a general right to ‘move’ for an amendment,” she suggests the next step is to look to the rule that specifically addresses exemptions, that being Rule 4003(a). Trustee states,

Rule 4003 specifically addresses exemptions. As a general rule of statutory interpretation, specific statutes are to take precedence over general statutes if there is some dispute about the interaction of the two statutes. The more important rule is to try to give meaning to the words of both statutes. The exemption rule is mandatory in nature. “The debtor **shall** list the property ... required to be filed by Rule 1007. ...” Rule 4003(a), F.R.B.P. (emphasis added). Rule 1007 is specific and mandatory in stating documents “shall” be filed within 15 days of filing the bankruptcy petition. Rule 1007(c), F.R.B.P. The language of these two rules is not ambiguous. A schedule of claimed exemptions must be filed within 15 days of filing a Chapter 13 bankruptcy.

Memorandum in support of objection to amendment – Document #20.

In the present case the Debtor has complied with Rule 4003(a). This Debtor filed the schedules and statements contemporaneously with the petition. Trustee’s argument

attempts to expand Rule 4003(a) to include *amendments* of Schedule C, which are exclusively covered by Rule 1009. Based on the plain language of Rule 1009(a) a debtor may amend Schedule C without court approval at anytime before the debtor's case is closed, with a few judicially created exceptions. A debtor may not amend Schedule C if he or she has done so in bad faith, has concealed property, or if creditors or third parties would be prejudiced by the amendment.

Collier on Bankruptcy states,

The debtor has a right to amend the petition, lists, schedules or statement as a matter of course until the case is closed. The only exception to this rule is the chapter 7 debtor's statement of intention with respect to property securing consumer debts. Thus, for example, before the closing of the case, the debtor may amend the exemption schedule to include property that had been omitted or improperly scheduled. Debtors may also amend to choose a different exemption scheme if they have a choice between state exemptions and the federal bankruptcy exemptions listed in section 522(d)... No court approval is necessary for an amendment filed before the case is closed. The permissive approach to amendments has been construed to give courts no discretion to reject amendments unless the debtor has acted in bad faith or concealed property, or the amendment would prejudice creditors.

9-1009 Collier on Bankruptcy-15th Edition Rev. P 1009.02(internal citations omitted).

The Seventh Circuit Court of Appeals endorses the permissive approach to amending schedules, with noted exceptions, stating,

[A] debtor may amend a voluntary petition pursuant to *Bankruptcy Rule 1009(a)* "as a matter of course at any time before the case is closed." *See Advisory Committee Note to Rule 1009; In re Peterson*, 920 F.2d 1389, 1394 (8th Cir. 1990); *Lucius v. McLemore*, 741 F.2d 125, 126 (6th Cir. 1984). There are exceptions to this principle. Exceptional circumstances may prevent a debtor from amending schedules. Amendment may be denied upon a showing of bad faith or prejudice to creditors or third parties. *See Matter of Doan*, 672 F.2d 831, 833 (11th Cir. 1982). A mere allegation by an objector of bad faith is insufficient. Bad faith and/or prejudice must be shown by clear and convincing evidence. *See Matter of Brown*, 56 Bankr. 954, 958 (Bankr. E.D. Mich. 1986). *In re Kobaly*, 142 Bankr. at 748-49. Agreeing with the position of other circuits regarding Bankruptcy Rule 1009(a), this circuit endorses the "permissive approach"

of allowing amendment of schedules, including lists of exempt property, at any time before the case is closed, with the caveat that an amendment may be denied upon a clear and convincing showing of bad faith by the debtor or prejudice to the creditors. *Accord, In re Calder*, 973 F.2d 862, 867 (10th Cir. 1992); *Matter of Williamson*, 804 F.2d 1355, 1358 (5th Cir. 1986); *Lucius v. McLemore*, 741 F.2d at 127; *Doan*, 672 F.2d at 833.

In re Yonikus, 996 F.2d 866, 871-872 (7th Cir. 1993).

Likewise, the Bankruptcy Appellate Panel for the Eighth Circuit has held,

The general rule allows liberal amendment of exemption claims. *In re Harris*, 886 F.2d 1011, 1015 (8th Cir. 1989); *see also In re Williamson*, 804 F.2d 1355, 1358 (5th Cir. 1986) ("The general rule is to allow liberal amendment of exemption claims, absent bad faith, concealment of property, or prejudice to creditors."). However, the policy of freely allowing amendment, while the case is still open, is not an absolute and can be tempered by the actions of the debtor or the consequences to the creditors.

The two recognized exceptions to this rule are bad faith on the part of the debtor and prejudice to the creditors. *See In re Doan*, 672 F.2d at 833 ("[A] court might deny leave to amend on a showing of a debtor's bad faith or of prejudice to creditors."); *In re Osborn*, 24 F.3d 1199, 1206 (10th Cir. 1994) (same); *Lucius v. McLemore*, 741 F.2d 125, 127 (6th Cir. 1984) (noting that courts may deny an amendment where the debtor has acted in bad faith or where property has been concealed).

Kaelin v. Bassett (In re Kaelin), 308 F.3d 885, 889 (B.A.P. 8th Cir. 2002).

In *Sandoval v. Sandoval* the Fifth Circuit Court of Appeals stated,

Under Bankruptcy Rule 1009(a), "[a] voluntary petition, list, schedule, or statement may be amended by the debtor as a matter of course at any time before the case is closed." BANKR.R. 1009(a). This court has interpreted Rule 1009(a) as prohibiting courts from denying the debtor's request to amend in a voluntary bankruptcy case, unless a creditor demonstrates the debtor's bad faith or prejudice to creditors. *In re Williamson*, 804 F.2d 1355, 1358 (5th Cir.1986). Under this liberal amendment policy, it is clear that the Sandovals were entitled to amend their petitions. However, allowing an amendment claiming an exemption is different from allowing the exemption itself. *In re Osborn*, 24 F.3d 1199, 1206 (10th Cir.1994).

Sandoval v. Sandoval, 103 F.3d 20, 22 (5th Cir. Tex. 1997).

These principles find a place in the prior jurisprudence of this Court. Judge

Waites has held,

Federal Rule of Bankruptcy Procedure 1009 states that, "[a] voluntary petition, list, schedule, or statement may be amended by the debtor as a matter of course at any time before the case is closed." The right to amend is not synonymous with the right to an exemption. *See In re Anzalone*, 318 B.R. 127, 128 (Bankr. CD. Ill. 2004). The general rule is that courts allow debtors to amend their schedules and seek an exemption absent bad faith, intentional concealment, or prejudice to creditors. *See id.* Numerous courts have held that when a debtor intentionally fails to disclose an asset in an attempt to hide it from the trustee or creditors, the court may, in its discretion, deny the debtor the ability to amend schedules to his advantage. This Court has adopted this position in *In re Allphin*, which states that, "[i]ntentional concealment of estate property will bar the debtor from claiming such property as exempt, after it surfaces as an asset." *Anderson v. Vereen (In re Vereen)*, 219 B.R. 691, slip op. (Bankr. D.S.C. 1997) (citing *In re Angelo*, 189 B.R. 24 (Bkrcty. D.R.I. 1995); *In re Cooper*, C/A No. 03-00900-JW, slip op. (Bankr. D.S.C. May 7, 2003).

In re Krapp, 2006 Bankr. LEXIS 2261, 3-4 (Bankr. D.S.C. Sept. 14, 2006). In a 1983 case Judge Davis, of this Court, also indicated that amendments should be liberally construed, stating, "Allowing a debtor to amend his schedules to claim exemptions prior to the closing of his case, absent objection of an adversely affected party, is consistent with the policy that exemption laws should be generally afforded a liberal construction." *In re McDonald*, 34 B.R. 842, 844 (Bankr. D.S.C. 1983).

The Eastern District of North Carolina, discussing a Fourth Circuit Court of Appeals opinion stated,

As a general rule, amendments are liberally allowed, and Rule 1009 contains no limitation of the debtor's right to amend. The United States Court of Appeals for the Fourth Circuit in construing an amendment to exemptions made under former Bankruptcy Rule 110, which the court stated is essentially the same rule as present Rule 1009, held that "a court ordinarily does not have discretion to deny leave to amend or to require a showing of good cause." *In re Tignor*, 729 F.2d 977, 978 (4th Cir. 1984). However, the court also observed that "exceptional circumstances may prevent the debtor in bankruptcy from amending his petition or schedules," *citing In re Doan*, 672 F.2d 831, 833 (11th Cir. 1982), *Tignor*

729 F.2d at 979. Some courts have precluded debtors from amending their schedules to claim exemptions in exceptional circumstances. The bankruptcy court in *In re Gregoire*, 210 B.R. 432 (Bankr. D.R.I. 1997) denied an amended exemption because of the debtor's bad faith in filing his schedules.

In re LoCurto, 239 B.R. 314, 316 (Bankr. E.D.N.C. 1999).

The Court need not determine if any of the judicially created exceptions apply in the present case, because the Trustee does not allege bad faith or prejudice to creditors. Trustee simply argues that Federal Rules of Bankruptcy Procedure 1009(a), 4003(a), and 9006 require a debtor to seek Court permission to amend exemptions after the fifteen day period of Rule 1007. The Trustee's objection is overruled. Absent bad faith or prejudice to a creditor or third party, Rule 1009(a) affords a debtor an absolute right to amend his schedule of exemptions until the case is closed without a need for court approval. Notice of the amendment must be given and parties are protected by the right to object to the amendment within 30 days as provided in the rules.

Conclusion

There has been no showing of bad faith or prejudice to the creditors in this case. As such, the Court has no discretion to deny Debtor's amendment to Schedule C. Debtor's amended exemption schedule is proper pursuant to 1009(a) and he is entitled to the homestead exemption.

AND IT IS SO ORDERED.
Columbia, South Carolina
June 2, 2008