

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:

Robert Clinton Davis and Kimberly Ann
Davis,

Debtors.

C/A No. 99-00358-W

JUDGMENT

Chapter 7

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, the Trustee's Objection to the allowance of the Debtors' claimed exemptions in certain accounts receivables pursuant to South Carolina Code Ann. §15-39-410 is sustained and the Debtors' claimed exemption is denied.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
May 28, 1999.

ENTERED
JUN 01 1999
J.G.S.

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ORDER

Chapter 7

THIS MATTER comes before the Court upon the Trustee's Objection to Property Claimed as Exempt. The Debtors Robert Clinton Davis ("Mr. Davis") and Kimberly Ann Davis assert that certain accounts receivables are exempt under South Carolina Code of Laws Annotated §15-39-410, as amended¹. The Trustee objects to the exemption. Based upon the stipulation of the parties that there are no factual issues in dispute and based upon arguments of counsel and a review of the pleadings, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Mr. Davis contracted with Leadership Development Incorporated ("LDI") as an independent contractor. LDI provided motivational, organization and management seminars to individuals and groups throughout the State of South Carolina. The duties of Mr. Davis included signing up individuals and groups for each seminar and serving as a speaker/presenter at the seminar. After each seminar, Mr. Davis was paid a commission based upon the total seminar fees which were collected by LDI from those participants. Upon the filing of the Chapter 7

¹Further references to the South Carolina Code of Laws Annotated and as amended, shall be by references to section number only.

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petition on January 14, 1999, Mr. Davis was owed \$8,673.00 in connection with pre-petition seminars. This amount was included on the Debtors' Amended Schedule B as account receivables.

On March 31, 1999, the Debtors filed an Amended Schedule C asserting an exemption in the unpaid receivables pursuant to § 15-39-410 as earnings for personal services. Attached to the Amended Schedule C was a document titled "[o]utstanding tuition owed me on 1/14/99." This document listed ten (10) "class members" who owed commissions to Mr. Davis. Seven (7) of the commissions owed were in the amount of \$717.00, two (2) were in the amount of \$777.00 and one (1) was in the amount of \$2,100.00.

The Schedules and Statements reflect that Mr. Davis is self employed serving as a training consultant/business instructor from April of 1975 to the present with an annual income for the last three (3) years ranging from \$91,000 to \$106,500. The Schedules and Statements also characterize Mr. Davis' business as a sole proprietorship and the monies owed to him as account receivables. Additionally, Schedule I, which shows current income from operation of business or profession, reflects deductions from his income for business expenses including advertising, supplies, classroom rental, telephone, travel and self employment taxes.

Kevin Campbell was appointed as the Chapter 7 Bankruptcy Trustee ("Trustee") and on April 7, 1999, filed an amended objection to the Debtors' claim for exemptions in the accounts receivables alleging that the account receivables were in fact due to Mr. Davis for pre-petition work and that § 15-39-410 did not apply. The parties agree that the total account receivables are property of the estate.

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CONCLUSIONS OF LAW

Section 522 of the Bankruptcy Code states in part, "[n]otwithstanding section 541 of this title, an individual debtor may exempt from property of the estate ... any property that is exempt under Federal law... or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition ..." 11 U.S.C. § 522 (b)(2)(a). South Carolina has opted out of the federal exemptions and therefore the appropriate exemptions are determined by state law. Hovis v. Lowe, 25 B.R. 86 (Bkrcty. D.S.C. 1982).

The general South Carolina exemption statute, which is similar in language to the exemptions contained in 11 U.S.C. § 522(d), is found in §15-41-30. However, as recognized by the Fourth Circuit Court of Appeals, South Carolina's exemptions are not limited to this section.

Section 522(b) of the Federal Bankruptcy Code simply states that federal law shall apply unless state law "specifically does not so authorize;" it does not require a state to gather together all of its exemptions into one statutory scheme. There can be no question that South Carolina has the power to enact laws relating to exemptions in any fashion it deems appropriate. By enacting section 15-41- 425, South Carolina declared only that state law shall govern the exemption of property in bankruptcy proceedings. It did not limit a debtor's bankruptcy exemptions to those listed in the state bankruptcy statute.

Hovis v. Wright, 751 F.2d 714 (4th Cir.1985).

In this case, the Debtors are asserting a right to an exemption in account receivables that Mr. Davis is owed for conducting seminars for LDI pursuant to § 15-39-410 which provides in full as follows:

The judge may order any property of the judgment debtor, not exempt from execution, in the hands either of himself or any other



person or due to the judgment debtor, to be applied toward the satisfaction of the judgment, except that the earnings of the debtor for his personal services cannot be so applied.

South Carolina Code Ann. §15-39-410 (emphasis added).

While the Trustee has the initial burden of proof to show that the exemption is not properly claimed, the burden will ultimately be upon Mr. Davis to establish that the account receivables are earnings for his personal service.

Federal Rule of Bankruptcy Procedure 4003(c) expressly provides that the objecting party has the burden of proving that the exemptions are not properly claimed. However, once the objector makes a prima facie case that the exemption is not properly claimed, the burden shifts to the debtor who has the ultimate burden of persuasion to establish that the property was properly claimed as exempt. See In re Wilbur, 206 B.R. 1002 (Bankr. M.D.Fla.1997).

In re Branscum, 229 B.R. 32 (Bkrcty. M.D.Fla. 1999).

The Trustee takes the position that the account receivables are owed to Mr. Davis arising out of his business and therefore should not fall within the definition of “earnings of the debtor for his personal services.” The Court agrees.

While the Court was not able to locate definitive South Carolina case law or legislative history that would aid in defining the term “earnings of the debtor for his personal services”, a review of similar terms in similar statutes from other jurisdictions leads to this Court’s conclusion that “earnings of the debtor for his personal services” should not include the earnings of an independent contractor such as Mr. Davis.

In the recent opinion from the Middle District of Florida cited above, Judge Paskay was faced with a similar exemption as the one before this Court. In Branscum, the debtor was



attempting to exempt monies paid to him for private investigator services pursuant to Florida's wage exemption statute. The Court in Branscum found that based upon the definition of earnings, which is defined in Florida Statute § 222.11 as "...compensation paid or payable, in money or a sum certain, for personal services or labor, whether denominated as wages, salary, commission, or bonus", the services of the private investigator were not wages but were earnings of an independent contractor and therefore not within the definition of the wage exemption statute.

In re Branscum involved a private investigator; however, a claim under the Florida wage exemption statute has also been denied in other "independent contractor" type professions as well. See In re Zamora, 187 B.R. 783 (Bkrtcy. S.D.Fla. 1995)(attorney); In re Porter, 182 B.R. 53 (Bkrtcy. M.D.Fla. 1994)(insurance agent); In re Lee, 204 B.R. 78 (Bkrtcy. M.D.Fla. 1996)(insurance agent); In re Hanick, 164 B.R. 165 (Bkrtcy. M.D.Fla. 1994)(real estate broker); In re Stroup, 221 B.R. 537 (Bkrtcy. M.D.Fla. 1997)(deferred compensation of a physician); In re Harrison, 216 B.R. 451 (Bkrtcy. S.D.Fla. 1997)(deferred compensation of a dentist); In re Manning, 163 B.R. 380 (Bkrtcy. S.D.Fla. 1994)(family business owner) but see In re Pettit, 224 B.R. 834 (Bkrtcy. M.D.Fla. 1998)("Although [debtor] is labeled an independent contractor, her activities are essentially a job and not in the nature of running a business").

While § 15-39-410 of the South Carolina Code is different from Florida's wage exemption statute, the distinction between wages and earning from personal services and services performed by an independent contractor is an important distinction.

The phrase "earnings for personal services" is intended to have a broader application than the restrictive meaning of the phrase

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“wages of a laborer.” The term “wages for personal services” has been held to imply a relationship of master and servant, or employer and employee, and to exclude compensation due an independent contractor. Likewise, there is authority that “earnings for personal services” are to be distinguished from the proceeds of a business carried on by the debtor; the legislative intent being to protect the fruit of someone’s labor for the benefit of his family, rather than income derived from passive sources, such as investment income or return on capital.

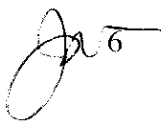
31 Am Jur 2d, Exemptions § 39. Other jurisdictions also follow this reasoning in applying a distinction between wages and salaries as compared to commissions and fees due to independent contractors or small business owners.

Both federal and state law provide that the maximum portion of "the aggregate disposable earnings of an individual" for an applicable work week is exempt up to a specified percentage. Earnings are defined as "compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise." 15 U.S.C. § 1672; Wyo.Stat. § 1-15- 102 (1997).

Mr. Welty's exemption fails because the accounts receivable of his business are not "disposable earnings" as defined by 15 U.S.C. § 1672. The United States Supreme Court interpreted the term "disposable earnings" for purposes of the CCPA in the case of Kokoszka v. Belford, 417 U.S. 642, 94 S.Ct. 2431, 41 L.Ed.2d 374 (1974), reh'ing denied 419 U.S. 886 (1974). The Court essentially equated disposable earnings with "periodic payments of compensation needed to support the wage earner and his family on a week-to-week, month-to-month basis." Id. at 651, 94 S.Ct. at 2436.

Wyoming law is in accord with Kokoszka and provides no support for the debtor's claim. In Coones v. Federal Deposit Insurance Corp., 796 P.2d 803, 805 (Wyo.1990), the Wyoming Supreme Court held that the words "or otherwise" in the statute do not operate to extend the exemption beyond conventionally described earnings for personal services. The court stated that profits and business earnings are outside the meaning of wages and salary. Id.

In re Welty, 217 B.R. 907 (Bkrtcy. D.Wyo. 1998). The Texas wage exemption statute has



similarly been held not to apply to independent contractors.

Tex.Prop.Code Ann. § 42.002 (Vernon 1984) reads in pertinent part: "The following personal property is eligible for the exemption ... (8) current wages for personal services."

As early as 1931, Texas courts defined current wages as "compensation for personal services to be paid periodically or from time to time." J.M. Radford Grocery Co. v. McKean, 41 S.W.2d 639 (Tex.Civ.App.--Fort Worth 1931, no writ). More recently Texas courts defined "current wages" as used in § 42.002(8) of the Texas Property Code to be compensation due an employee in a master-servant relationship. This definition excludes monies received by an independent contractor. See, Hennigan v. Hennigan, 666 S.W.2d 322, 324 (Tex.Civ.App.--Houston [14th Dist.] 1984, writ ref'd n.r.e.).

...

Some tests commonly applied to determine whether a person is an independent contractor are: (1) his right to control the progress of the work, except as to final results; (2) his obligation to furnish necessary tools, supplies, and material to perform the job; (3) the time for which he is employed; (4) the method of payment, whether by time or the job; (5) skill required for the performance of the work or the independent nature of his business; and (6) the freedom as to hours of labor. *Id.* at § 4. See also Summers v. Skillern & Sons, Inc., 381 S.W.2d 352 (Tex.Civ.App.--Waco 1964, writ dism'd w.o.j.).

In re Martin, 117 B.R. 243 (Bkrtcy. N.D.Tex. 1990).

From the evidence before the Court, it appears that Mr. Davis furnishes the necessary tools, supplies and material to perform the work, is paid by the job rather than the time he spends, and enjoys considerable control and freedom over how the work is performed, all indications of an independent contractor.

The Court was able to locate only one opinion regarding § 15-39-410, or at least its predecessor, and this case implied that the Statute should be interpreted more narrowly than the definition asserted by the Debtor.

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Finally, appellants contend that the lower Court erred in holding that Mr. Matthews was not entitled to the benefit of Section 750 of the Code of 1942, which gives authority to a Judge to order any property of the judgment debtor, not exempt from execution, 'applied towards the satisfaction of the judgment; except that the earnings of the debtor for his personal services, at any time within sixty days next preceding the order, cannot be so applied, when it is made to appear * * * that such earnings are necessary for the use of a family supported wholly or partly by his labor.'

Mathews v. Mathews, 207 S.C. 170, 35 S.E. 2d 157 (S.C. 1945). The reference in Mathews v. Mathews that the “earnings are necessary for the use of a family supported wholly or partly by his labor” lends support to the argument that South Carolina would follow an interpretation that “earnings of the debtor for his personal services” is limited to wages and ordinary salaries rather than account receivables due to independent contractors, or individuals engaged in business as sole proprietors.

In this case, the Debtors have failed to meet their burden of proof by failing to show that § 15-39-410 should be applied to the earnings of an independent contractor or any portion of the account receivables at issue here.

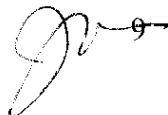
Further support for the Trustee’s argument that § 15-39-410 does not apply to the circumstances of this case can be found by referencing other statutes. Section 15-41-30(5) provides that a debtor who does not take a homestead exemption may take up to a \$1,000 exemption in “cash and other liquid assets.” The term “liquid assets” is defined to include “unpaid earnings not otherwise exempt ... and other receivables.” Based upon this statute, it does not appear to be the intent of the legislature to allow a debtor in a bankruptcy case to exempt any amount of earnings for personal services. The Court can readily envision situations where the

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amount asserted as “earnings for personal services” could be very substantial in the situation of accounts receivables for physicians, commissions for insurance agents and real estate brokers, and fees for attorneys working on a contingency fee basis. In such cases, the amounts exemptible could be well beyond that necessary for preservation of a debtor’s fresh start or for the support of his dependents. The Court is of the opinion that this legislative cap of \$1,000 is an indication that the legislature did not intend for an unlimited exemption in earnings for personal services as would follow from acceptance of the Debtors’ position.

Additionally, the Trustee argues that §15-39-410 does not apply to bankruptcy cases. In other exemption statutes outside of Chapter 41 of Title 15, such as § 38-63-40 which provides that certain proceeds and cash surrender values of life insurance “are exempt from creditors of the insured”, the legislature indicates whether the statute was applicable to a bankruptcy case. Section 38-63-40 was re-written in 1993 to include language which indicated that this statute did not apply “if the insured has filed a petition in bankruptcy within two years of purchasing the insurance.” Clearly the state legislature can indicate whether a statute is applicable to a bankruptcy proceeding and they have not done so in regards to §15-39-410.

Further, the Trustee argues that even if §15-39-410 were applicable to bankruptcy cases, it might not be applicable to these particular Debtors because the “account receivables” in question are for unpaid earnings and §15-39-410 could be interpreted to only apply to earnings that have been paid. Several sections of the South Carolina Code, Sections 15-41-30(5), 37-3, 403, 37-5-104 and 37-5-106, use the term “unpaid earnings” as opposed to the term “earnings” used in § 15-39-410 (also see § 37-2-710). An argument could be made that the state legislature has made a distinction between “earnings” and “unpaid earnings” and because §15-39-410 only

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refers to earnings, it is not applicable to these Debtors because Mr. Davis's earnings were unpaid earnings. Since this Court finds that §15-39-410 does not apply to independent contractors such as the Debtors, it need not make this additional finding.

For the foregoing reasons, the Court sustains the Trustee's objection to the Debtors' claimed exemption listed as accounts receivables pursuant to South Carolina Code Ann. §15-39-410 and the Debtors' claimed exemption is denied.

AND IT IS SO ORDERED.

Columbia, South Carolina,
May 28, 1999.


UNITED STATES BANKRUPTCY JUDGE



CERTIFICATE OF MAILING
The undersigned deputy clerk of the United States
Bankruptcy Court for the District of South Carolina hereby certifies
that a copy of the document on which this stamp appears
was mailed on the date listed below to:

JUN 1 1999

DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE

JUDY G. SMITH

Deputy Clerk

w/ judgment
Davis
Mallagher
KC
CSTR
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