



**ENTERED**

TAWANA C. MARSHALL, CLERK  
THE DATE OF ENTRY IS  
ON THE COURT'S DOCKET

**The following constitutes the order of the Court.**

**Signed July 19, 2005**

  
United States Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION**

**IN RE:**

**DALE RICHARD GROTJOHN  
d/b/a DALE'S WOODWORK,**

**Debtor.**

§  
§  
§  
§  
§  
§

**CASE NO. 03-47055-DML**

**CHAPTER 7**

**MEMORANDUM OPINION**

Debtor Dale Grotjohn filed a chapter 7 petition in bankruptcy in July 2003. In his original schedules, Debtor failed to disclose his interest in an alleged partnership, Carz, which was then an active car dealership. Fourteen months later, after Debtor received his discharge and his case was closed, Debtor alleged in a state court counterclaim that his alleged partner in Carz, Stanley Wright, failed to share partnership profits with him. In response to Carz's and Wright's claims that Debtor's counterclaim was estopped due to his failure to list the alleged partnership interest and his cause of action in his bankruptcy case, Debtor reopened his bankruptcy case, amended his schedules to add the partnership and his claims against Wright and Carz, and then purported to exempt those interests.

Diane Reed, the Chapter 7 Trustee, and creditors Stanley Wright and Carz, Inc. object to the amended exemptions of Debtor Dale Grotjohn.

In this opinion, the Court (1) finds that Debtor's partnership allegations confer standing on Wright and Carz to object to his exemptions, (2) concludes that Judge Lynn's prior order authorizing Debtor to amend his exemptions does not bar objections to the amended exemptions, and (3) finds that the amended exemptions should not be permitted because they are prejudicial to the estate and are not made in good faith.

Objections to exemptions are core matters over which this court has jurisdiction to enter a final judgment. 28 U.S.C. §§ 1334 and 157(b)(2)(B). This memorandum opinion replaces the oral findings of fact and conclusions of law rendered by the court on July 8, 2005.

I. Background Facts.

Debtor commenced his bankruptcy case by filing a voluntary petition under Chapter 7 on July 29, 2003. Diane Reed was appointed the Chapter 7 Trustee.

Debtor filed his schedule of assets and liabilities and statement of financial affairs on August 5, 2003. His first meeting of creditors pursuant to 11 U.S.C. § 341 was conducted on October 20, 2003. Debtor received a discharge on January 14, 2004, and his case was closed as a no-asset case on that same date.

Prior to filing his petition in bankruptcy, Debtor had worked as a car salesman for an entity that did business as Carz or Carz, Inc. Debtor ceased to work in that business in January 2003.

According to Debtor, Carz was a partnership of which he was a one-third general partner. Notwithstanding that understanding, Debtor did not list the partnership interest

as an asset in his schedule B, nor did he list Carz as a partnership in which he had had an interest in response to question 18a of his statement of financial affairs. According to Debtor, he did not schedule the partnership interest because as of the date of his petition in bankruptcy he believed that Carz had no value, and his bankruptcy counsel had instructed him only to list those assets that had value. Debtor also did not list as assets in schedule B any claims against Carz or one of his alleged partners in Carz, Stanley Wright. Debtor testified that no such claims were listed because as of July 29, 2003, he knew of no such claims.

Sometime prior to September 16, 2004, Debtor came to believe that he had claims against Carz and Wright. On that date, Debtor entered into an agreement with Dale Rabe, pursuant to which Debtor purported to assign to Rabe a one-third interest in his claims against Wright and Carz in return for \$15,000.

The nature of those claims was manifested on September 24, 2004, when Debtor filed an answer and counterclaim against Wright and Carz in a lawsuit pending in the 141st District Court of Tarrant County, Texas (the "State Court Lawsuit"). In that counterclaim, Debtor alleged that he, Wright, and Jack Gadberry had created the Carz partnership prior to August 2001. He further alleged that Wright had breached the partnership agreement by failing to share profits and losses with Debtor. After Debtor filed his state court counterclaim, Wright asserted that Debtor's failure to schedule his claims against Wright and Carz in his bankruptcy case estopped him from asserting his counterclaim. On November 1, 2004, Debtor moved to reopen his bankruptcy case so that he could amend his schedules to add the partnership interest and the causes of action as assets of his estate.

On January 11, 2005, Judge D. Michael Lynn signed an agreed order reopening the bankruptcy case and permitting Debtor to amend his schedules. The agreed order also permitted Carz and Wright to object to any amended exemptions claimed by Debtor. Debtor amended schedules B and C on January 26, 2005; amended schedules C and D on April 25, 2005; and amended schedules A, B, D, E, G, H, and I on May 25, 2005. Debtor amended his statement of financial affairs on January 26, 2005, and once again on May 25, 2005.

Wright, Carz, and the Trustee, object to Debtor's amended exemptions in schedule C. Specifically, they object to that portion of the amended exemptions wherein Debtor purports to exempt 100% of his interest in the Carz partnership and his claims against Wright and Carz.

## II. Debtor's Challenge to Carz's and Wright's Standing.

Debtor contends that Carz and Wright lack standing to object to his exemptions because they are not creditors. Although Debtor listed Carz as a secured creditor in his original schedules, Debtor argues that Carz repossessed its collateral after his petition in bankruptcy and sold it for more than the debt owed to Carz. Consequently, Debtor argues that while Carz may have been a creditor as of the date of his petition in bankruptcy, it was not a creditor as of the date that it objected to his amended exemptions.

At the hearing on the objection to exemptions, Wright testified that he had loaned Debtor approximately \$20,000 prior to his petition in bankruptcy. Debtor argues, however, that Wright has no documents to evidence these loans and that, in any event, such loans are barred by limitations.

The court resolves the standing issue solely by reference to Debtor's counterclaims in the State Court Lawsuit. In both his original counterclaim (Wright Exhibit 49) and his amended counterclaim (Wright Exhibit 14), Debtor alleges that Wright breached the partnership agreement by failing "to share profits and *losses* of the partnership." If Carz had losses, Debtor is accountable to the partnership for such losses. TEX. REV. CIV. STAT. ANN. art. 6132b – 4.01(b) (Vernon Supp. 2004). He is likewise accountable to Wright for any disproportionate contributions that Wright made to the partnership to cover such losses. *Id.* at art. 6132b – 4.01(c). Section 101(5) of the Bankruptcy Code defines "claims" broadly to include any right to payment, even if such right is unliquidated, contingent, matured, or disputed. 11 U.S.C. § 101(5). Debtor's pleadings in the State Court Lawsuit constitute admissions that Carz and Wright possess "claims" within the meaning of section 101(5). At a minimum, Carz and Wright are parties in interest in Debtor's bankruptcy case and, as such, possess standing to object to his exemptions. *See* 11 U.S.C. § 502(a).

### III. Judge Lynn's Prior Order.

Debtor argues that because the agreed order signed by Judge Lynn permitted him to amend his exemptions, as long as his amended exemptions fall within the limits allowed by section 522, they must be allowed. This court does not read Judge Lynn's order to be so restrictive. Instead, the order explicitly preserves the right of Carz and Wright to object to the amended exemptions. Because the order does not limit the type of objections that Carz and Wright can make, Debtor's argument is overruled.

IV. Standards Applicable to the Amended Exemptions.

Bankruptcy Rule 1009(a) provides that debtors may amend their schedules as a matter of course at any time before the case is closed. FED. R. BANKR. P. 1009(a). In *Stinson v. Williamson (In re Williamson)*, 804 F.2d 1355, 1358 (5th Cir. 1986), the court held that a party may amend his exemptions unless the amended exemption is made in bad faith or is prejudicial to creditors. Bankruptcy Rule 4003(c) requires the objecting party to bear the burden of proving that objections are not properly claimed. FED. R. BANKR. P. 4003(c); *see also In re Cudeyro*, 213 B.R. 910, 918 (Bankr. E.D. Pa. 1997) (party objecting to amendment bears burden of proving that exemptions are not properly claimed); *see also In re Harrington*, 306 B.R. 172, 181 (Bankr. E.D. Tex. 2003) (objecting party bears burden of proving that exemptions are not properly claimed).

Carz and Wright contend that Debtor should not benefit from the permissive standard of Rule 1009(a) and that they should not bear the burden imposed by Rule 4003(c) because Debtor only sought to amend his exemptions after his case was closed, and only then after Carz and Wright raised Debtor's bankruptcy as a bar to his assertion of claims against them. The court need not determine whether the burden should be reversed under such circumstances because shifting the burden does not affect the outcome of this case.

V. Analysis of Prejudice to the Estate.

Even assuming that the objectors bear the burden, the evidence establishes the estate has been prejudiced by Debtor's failure to (1) schedule the alleged partnership interest and the claims against Wright as assets of this estate and (2) timely claim an exemption in those assets.

The critical deficiency is Debtor's failure to list the partnership interest as an asset, much less to exempt it in his original schedules. As of July 29, 2003, Debtor knew that he had an interest in the Carz partnership, or at least believed that he did. On that date, Carz was still in business as a car dealer.

Debtor's contention that he did not list the partnership as an asset because he thought it had no value is not sustainable. First, schedule B does not require that an asset have value as a prerequisite to it being listed as an asset. Moreover, question 18a of the statement of financial affairs requires Debtor to list partnerships in which he has been a partner in the six years prior to bankruptcy, and does not limit Debtor's responses to only those partnerships that have value.

The prejudice that flows from non-disclosure of the partnership interest emphasizes the point for disclosure in the first place. Had Debtor disclosed a partnership interest in an ongoing car business, a reasonably prudent trustee would have investigated the value of that interest on behalf of the estate, notwithstanding Debtor's own belief as to the partnership's lack of value.

It is likely that the Trustee's investigation would have resulted in her uncovering Wright's current position, that is, that Carz is not now and has never been a partnership. It is logical to assume that the Trustee would have conveyed Wright's response to Debtor in order to find out the basis for his allegation that such a partnership existed. At that time Debtor would have known that Wright denied the existence of the partnership. According to Debtor, Wright's denial of the existence of the partnership in 2004 was among the things that triggered Debtor's belief that he had claims against Wright and Carz. Consequently, had Debtor complied with his duty of full disclosure and disclosed

his alleged partnership interest, the dispute with Wright and Carz could have been brought to light at the beginning of his bankruptcy case.

Further prejudice ensued from Debtor's failure to disclose the partnership interest. First, without this court's authorization, Debtor conveyed away a one-third interest in the claims to Rabe. Second, Debtor hired lawyers without this court's authorization. Moreover, by failing to list the partnership interest and the claims, Debtor exposed those assets to the defense of judicial estoppel pursuant to the Fifth Circuit's rulings in *Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197 (5th Cir. 1999) and *Superior Crewboats, Inc. v. Primary P & I Underwriters (In re Superior Crewboats, Inc.)*, 374 F.3d 330 (5th Cir. 2004).<sup>1</sup>

In short, Debtor saddled the non-disclosed assets with numerous burdens, all without the knowledge or consent of the Trustee or this court. While it is possible that the Trustee can overcome those burdens, she and the estate have suffered prejudice simply by being challenged to do so.

Debtor argues that the estate was not prejudiced because the partnership interest and his claims against Wright and Carz either had no value as of July 29, 2003, or they had a value less than the amount of his wild card exemption under 11 U.S.C. § 522(d)(5). Debtor argues that because these assets were fully exemptible in the first place, the estate cannot now be prejudiced by permitting him to amend his schedules to exempt these assets. As a corollary to this argument, Debtor argues that any value that may be ascribed to these assets today is attributable to the efforts of Debtor after July 29, 2003.

---

<sup>1</sup> Wright and Carz also contend that Debtor's failure to schedule the Carz partnership constitutes a judicial admission that no such partnership exists.

The parties presented evidence on the value of the partnership interest and the claims against Carz and Wright as of July 29, 2003. The most probative evidence of the value of those assets is the consideration paid by Rabe, who, in September 2004, paid \$15,000 for a one-third interest in the claims against Carz and Wright. This arms-length transaction indicates that the non-disclosed assets had a value as of July 29, 2003 that exceeded Debtor's wild card exemption and, as such, some portion – if not the larger portion – would have belonged to the estate even if Debtor had properly exempted these assets.

Moreover, the court views with skepticism any claim that a non-disclosed asset had no value as of the date of filing, but was made valuable afterwards due to Debtor's efforts. This after-the-fact analysis not only tends to be self-serving, but misses the point of disclosure in the first place. Intangible assets such as partnership interests or causes of action are rarely susceptible to precise valuation. Not only does their value depend on numerous substantive variables, but also upon the resources that a trustee possesses and is willing to risk in order to realize value. A key function of disclosure is to permit the trustee, whose duty is to maximize assets for the benefit of creditors, to analyze the potential risks and rewards associated with these assets. That prerogative is frustrated by non-disclosure. Consequently, the objectors have demonstrated prejudice, and the amended exemptions are denied on that basis.

VI. Analysis of Bad Faith.

Having found prejudice, the court is not required to find bad faith in order to deny the amended exemptions. However, the court finds that this factor also mitigates against permitting Debtor to amend his exemptions here.

In *Cadle Co. v. Mitchell (In re Mitchell)*, 102 Fed. Appx. 860, 2004 U.S. App. LEXIS 13256, No. 03-10885, slip op. (5th Cir. June 28, 2004) and *United States Trustee v. Moschella (In re Moschella)*, 2004 Bankr. Lexis 1108, No. 03-47690-DML-7 (Bankr. N.D. Tex. Aug. 9, 2004), the courts looked to the number of errors in the debtors' schedules in order to determine whether the debtors' discharges should be denied due to making false oaths with fraudulent intent. In those cases, the courts defined "fraudulent intent" to include "reckless disregard for truth."

Here, the standard is bad faith, not fraud. However, it is difficult to reconcile the notion that a debtor who has committed fraud by omitting assets from his schedules can nevertheless act in good faith when he purports to exempt the assets he previously failed to disclose. At a minimum, *Mitchell* and *Moschella* instruct that the totality of the errors in Debtor's schedules and statement of financial affairs are relevant to the question of whether Debtor has acted in good faith with respect to his claim of exemptions.

Here, Debtor's omissions in the following respects concern the court: (1) Debtor's failure to list the Carz partnership as an asset in original schedule B; (2) Debtor's failure to exempt the Carz partnership interest in original schedule C; (3) Debtor's failure to disclose the partnership interest in response to question 18a in the original statement of financial affairs; (4) Debtor's failure to disclose a \$2,500 pre-petition payment to Wright in response to question 3 in the original statement of financial

affairs and the first amended statement of financial affairs; (5) Debtor's failure to disclose a \$10,000 payment to attorney John Hixson in response to question 3 of the original statement of financial affairs and the first amended statement of financial affairs; (6) Debtor's failure to disclose in original schedule B and first amended schedule B certain counterclaims against J. Thomas Miller in state court litigation styled *Miller v. Grotjohn*; and (7) Debtor's failure to list his interest in two corporations, GPCSA, Inc. (a Texas corporation) and GPCSA, Inc. (an Oklahoma corporation) in his original schedule B and first amended schedule B. The foregoing is not an exhaustive list of Debtor's errors in his schedules and statement of financial affairs, but it contains the errors that most concern the court because the omitted entries represent potential assets for administration by the Trustee.

These errors are of sufficient materiality that the court can only conclude that Debtor's schedules and statement of financial affairs were prepared with reckless disregard for the truth and were therefore submitted in bad faith. This bad faith mitigates against permitting Debtor to amend schedule C to claim as exempt any portion of the partnership interest and the claims against Wright and Carz.

VII. Conclusion.

For the reasons stated herein, the objections of the Trustee, Wright, and Carz to Debtor's amended exemptions of the partnership interest in Carz and his claims against Carz and Wright are sustained.