

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF NEW YORK

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In re:

CASE NO. 00-20534

DANIEL M. BENJAMIN and  
MICHELE BENJAMIN,

Debtors.

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In re:

CASE NO. 00-22921

LINDA A. MOODY,

DECISION & ORDER

Debtor.

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**BACKGROUND**

On March 6, 2000, Daniel M. Benjamin and Michele Benjamin (the "Benjamins") filed a petition initiating a Chapter 7 case. On the Schedules required to be filed by Section 521 and Rule 7001, the Benjamins: (1) indicated at Item No. 17 of Schedule B, which requires debtors to set forth other liquidated debts owing to them, including tax refunds, that they were due: (a) Federal and New York State income tax refunds for 1999 totaling \$2,489.00 (the "Income Tax Refunds"); and (b) the return of an escrow from the Andrew F. Capoccia Law Center, LLC ("The Capoccia Firm") in the estimated amount of \$585.00 (a "Capoccia Refund")<sup>1</sup>; (2) indicated that they had cash-on-hand of \$50.00,

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<sup>1</sup> The Benjamins did not list the Capoccia Refund at Item No. 1, cash, or Item No. 2, checking, savings or other financial accounts, certificates of deposit, or shares in banks, savings and loan, thrift, building and loan, and homestead associations, or credit unions, brokerage houses, or cooperatives.

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a checking account with \$200.00 on deposit, and a savings account with \$400.00 on deposit; (3) claimed on Schedule C a cash exemption of \$2,500.00 each in the cash-on-hand, deposit accounts, Income Tax Refunds and the Capoccia Refund, pursuant to New York Debtor & Creditor Law (the "DCL") Section 283(2);<sup>2</sup> and (4) indicated that they had \$19,836.00 in unsecured debts.

On October 4, 2000, Linda A. Moody ("Moody") filed a petition initiating a Chapter 7 case. On the Schedules required to be filed by Section 521 and Rule 7001, Moody: (1) indicated at Item No. 3 of Schedule B, which requires debtors to set forth security deposits with public utilities, telephone companies,

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<sup>2</sup> DCL Section 283(2) provides that:

2. Contingent alternative bankruptcy exemption. Notwithstanding section two hundred eighty-two of this article, a debtor, who (a) does not elect, claim, or otherwise avail himself of an exemption described in section fifty-two hundred six of the civil practice law and rules; (b) utilizes to the fullest extent permitted by law as applied to said debtor's property, the exemptions referred to in subdivision one of this section which are subject to the five thousand dollar aggregate limit; and (c) does not reach such aggregate limit, may exempt cash in the amount by which five thousand dollars exceeds the aggregate of his exemptions referred to in subdivision one of this section or in the amount of two thousand five hundred dollars, whichever amount is less. For purposes of this subdivision, cash means currency of the United States at face value, savings bonds of the United States at face value, the right to receive a refund of federal, state and local income taxes, and deposit accounts in any state or federally chartered depository institution.

NY DCL § 283(2) (2000).

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landlords, and others, that she was due a Capoccia Refund for money being held by the firm in the estimated amount of \$4,000.00; (2) claimed on Schedule C a cash exemption of \$2,500.00 in the Capoccia Refund pursuant to DCL § 283(2); and (3) indicated that she had \$31,931.86 in unsecured debts.

The Chapter 7 Trustees for the Benjamins and Moody filed motions (the "Turnover Motions") which requested that the Court: (1) deny the claimed exemptions in the Capoccia Refunds; and (2) direct the Benjamins and Moody to turn over to the Trustees any and all amounts received from The Capoccia Firm. The Turnover Motions alleged that: (1) the amounts due or to become due from The Capoccia Firm were property of the respective debtors' estates under Section 541; and (2) the rights which the Benjamins and Moody had at the time of the filing of their respective petitions to receive a Capoccia Refund of all or a portion of the funds they paid to the Firm as a retainer were not "cash" as defined by DCL § 283(2), which is specifically, "currency of the United States at face value, savings bonds of the United States at face value, the right to receive a refund of federal, state and local income taxes, and deposit accounts in any state or federally chartered depository institution."

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The Benjamins and Moody each interposed opposition to the Turnover Motions which asserted that: (1) they had engaged The Capoccia Firm to assist them in settling, at a discount, some of their unsecured indebtedness, and had, pursuant to a retainer agreement,<sup>3</sup> given the Firm funds for it to utilize in attempting to settle the debts; (2) the funds remaining with The Capoccia Firm at the time of the filing of their petitions pursuant to the retainer agreements were their funds; (3) upon information and belief, since The Capoccia Firm was paying them interest on the funds being held pursuant to the retainer agreements, those funds were being held by the Firm in deposit accounts in either a state or federally chartered institution; and (4) because The Capoccia Firm was holding their funds in a deposit account in a state or federally chartered institution, those funds qualified for the "cash" exemption provided for by DCL § 283(2).

#### DISCUSSION

As a result of financial hardships, the Benjamins and Moody elected to file voluntary Chapter 7 cases. In Chapter 7, in

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<sup>3</sup> The Capoccia Firm's Retainer Agreement, provided to the Court by Moody, does not require the funds given to the Firm as a retainer to be in any way segregated.

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exchange for a discharge from all dischargeable debts, a debtor is required to surrender any and all non-exempt assets for administration and distribution to creditors. Although at times garnishments, foreclosures, repossessions, collection letters and telephone calls from unpaid creditors influence the timing of the filing of a voluntary bankruptcy petition, in the end the debtors elect when to file.

In their bankruptcies, the Benjamins and Moody were represented by counsel when they filed their petitions, so they were fully informed of all of their rights. Therefore, they must have balanced their ability to exercise their possession and control over any non-exempt assets, including any refunds such as the Capoccia Refunds,<sup>4</sup> against any consequences from the collection actions of their creditors.

The New York State Legislature in enacting DCL § 283(2) developed an exclusive list of the types of property that are "cash" for purposes of that particular exemption, so that a debtor may not exempt other types of property not specifically set forth in the statute. Even if it is true, as asserted by

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<sup>4</sup> The Benjamins and Moody indicated in their opposition to the Turnover Motions that they had attempted to obtain refunds from The Capoccia Firm prior to the filing of their petitions.

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the Benjamins and Moody, that Courts should liberally construe exemption statutes, in the case of DCL § 283(2), where specific types of exempt property are clearly enumerated, a liberal construction of the statute does not permit a Court to expand the types of property that qualify for exempt status.

The Benjamins and Moody assert that, assuming The Capoccia Firm has the funds they placed with it pursuant to their respective retainer agreements in a deposit account in the Firm's name in a state or federally chartered institution, those funds qualify for cash exemption status because: (1) they are the debtor's funds; and (2) they are on deposit in a state or federally chartered institution. I disagree.

I believe that for funds of a debtor on deposit in a deposit account to qualify for exempt status under DCL § 283(2) the account must be in a state or federally chartered institution and be: (1) maintained in the name of and directly controlled by the debtor, which could include a joint account where the debtor is one of the account holders; or (2) specifically designated as an account in trust for the debtor, such as a Uniform Gifts to Minors Act deposit account.

In these cases, on the date of the filing of their petitions, the Benjamins and Moody had no ownership interest in,

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or direct right to, any specific commingled funds that may have been on deposit in any deposit account maintained by The Capoccia Firm in a state or federally chartered institution, even if the account actually included funds which they originally deposited with the Firm as a retainer. The only right that the Benjamins and Moody had against The Capoccia Firm on the dates of the filing of their petitions was to obtain a refund of all or a portion of the funds they gave to the Firm as a retainer in accordance with the terms of their respective retainer agreements, and should the Firm fail to voluntarily refund any balance due, the Benjamins and Moody could only commence an action against the Firm, obtain a judgment, and execute upon that judgment.

In summary, all that the Benjamins and Moody had at the time of the filing of their petitions was a right to a refund from The Capoccia Firm under the contractual provisions of their retainer agreements. They had no direct right to, or in, any commingled funds that the Firm may have had on deposit in any state or federally chartered institution. Therefore, their Capoccia Refunds were not entitled to the "cash" exemption provided for by DCL § 283(2).

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Debtors, at the time of the filing of their petitions can, and often do, have any number of retainers, escrows or deposits being held by various entities, including retainers with law firms, deposits for the purchase of goods with merchants, and monies in escrow with real estate brokers in connection with the purchase of real property. These retainers, escrows or deposits can be, and often are, commingled with other retainer, escrow and deposit funds in unsegregated deposit accounts maintained by those entities in state or federally chartered institutions. Certainly the New York State Legislature when it enacted DCL § 283(2) was aware that debtors often have such retainers, escrows and deposits with various entities. It could easily have included the right to obtain a refund of all or a portion of those assets within the definition of "cash," however, it failed to do so.<sup>5</sup> Therefore, such assets are not entitled to the "cash" exemption.

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<sup>5</sup> The Benjamins and Moody have failed to provide the Court with any legislative history or case law to support their position that commingled retainers, escrows or deposits being held by third parties in a depository account in the name of the third party qualify for cash exemption status.

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CONCLUSION

The Turnover Motions of the respective Trustees of the Benjamins and Moody are in all respects granted.

Along with this Decision & Order, the Court has signed the proposed orders submitted by the Trustees.

**IT IS SO ORDERED.**

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HON. JOHN C. NINFO, II  
CHIEF U.S. BANKRUPTCY JUDGE

**Dated: March 7, 2001**