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 United States District Court, W.D. New York.
 In re Gary ONDREY, Debtor.
 Gary ONDREY, Appellant,
 v.
 Daniel E. BRICK, Appellee.
Nos. 99-CV-0011E(H), 97-BK-16356K.

June 15, 1999.

[Garry M. Graber](#), and Gregory J. Everdyke, c/o Hodgson, Russ, Andrews, Woods & Goodyear, Buffalo, NY, for the Appellant.
[James D. Gauthier](#), and [Ann E. Evanko](#), c/o Hurwitz & Fine, Buffalo, NY, for the Appellee.

MEMORANDUM and ORDER

[ELFVIN](#), J.

*1 Appellant Ondrey, a Chapter 7 debtor, appeals from Bankruptcy Judge Michael J. Kaplan's November 3, 1998 Order granting in part and denying in part Ondrey's claimed exemptions.^{FN1} For the reasons that follow, that Order will be affirmed in part and vacated in part.

^{FN1}. The Bankruptcy Court's decision is published at [227 B.R. 211](#).

Ondrey, a United States citizen and New York resident who works in Canada, claimed exemptions from the bankruptcy estate for funds contained in a Canadian pension plan ("the Pension Plan") established by his employer, Air Canada, and in a Canadian "Registered Retirement Savings Plan" ("the Savings Plan") administered by O'Donnell Group of Funds, a group of funds created under the laws of Ontario, Canada. After objections thereto were presented by Appellee ("the

Trustee"), Judge Kaplan denied an exemption for the Savings Plan but granted one for the Pension Plan "except to the extent that it might exceed the reasonable needs of the Debtor or his dependents, as contemplated by [\[New York's Debtor and Creditor Law\] § 282\[\(iii\) \]\(2\)\(e\)](#)." [227 B.R. at 216](#). Ondrey appeals, arguing (1) that the Savings Plan should be exempted from the bankruptcy estate either (i) under [section 5205\(c\)\(1\) of New York's Civil Practice Law and Rules](#) ("CPLR") or (ii) under [section 282\(iii\)\(2\)\(e\) of New York's Debtor and Creditor Law](#) ("D & CL") and (2) that the exemption for the Pension Plan ought not be limited to his and/or his dependents' "reasonable needs" because such limitation was deleted from [D & CL § 282\(iii\)\(2\)\(e\)](#) by a 1989 amendment thereto. The Trustee argues (i) that Judge Kaplan correctly decided that the Savings Plan is not exempt under either [CPLR 5205\(c\)\(1\)](#) or [D & CL § 282\(iii\)\(2\)\(e\)](#) and (ii) that it was within Judge Kaplan's discretion to limit the exemption for the Pension Plan to Ondrey's and/or his dependents' reasonable needs.

With respect to the Savings Plan, Ondrey argues that such falls within the exemption set forth in [CPLR 5205\(c\)\(1\)](#)^{FN2} because, he asserts, the funds therein are traceable to a pension plan previously established by Air Canada that has since been dissolved, whereupon its funds were distributed to him and the other participants. However, Judge Kaplan correctly held in an earlier Order, dated April 28, 1998, that a trust account will not come within the exemption set forth in [section 5205\(c\)\(1\)](#) where the account holder or beneficiary may withdraw funds therefrom at will. Record on Appeal, Item 8 at 3-5; see [Vanderbilt Credit Corp. v. Chase Manhattan Bank, NA, 473 N.Y.S.2d 242, 245 \(App.Div., 2d Dept.1984\)](#) ([section 5205\(c\)\(1\)](#) protects only a spendthrift trust settled by a person other than the beneficiary). Ondrey does not challenge such conclusion and has not disputed that he has unfettered access to the funds therein and may withdraw such at any time. Record on Appeal, Item 11, ¶ 4.^{FN3} While early withdrawal of funds from the Savings Plan - *i.e.*, prior to his attainment of a certain

age - will result in his suffering an unspecified tax penalty, such penalty has not been shown to constitute a restraint on alienation under the common law of spendthrift trusts. See *In re Iacono*, 120 B.R. 691, 695 (Bankr.E.D.N.Y.1990) (finding that funds in Individual Retirement Accounts, which may be withdrawn prior to age 59 1/2 subject to - in most cases - a ten percent tax penalty, were not exempt under CPLR 5205(c)(1)), *overruled on other grounds by In re Dubroff*, 119 F.3d 75 (2d Cir.1997) (holding that IRAs were exempt under the plain language of D & CL § 282(iii)(2)(e) as it existed prior to September 1, 1995). Consequently, Judge Kaplan correctly denied an exemption based upon CPLR 5205(c)(1).

FN2. Such statute sets forth an exemption from application for the satisfaction of money judgments for “all property while held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor * * *.” It is incorporated as an exemption from the bankruptcy estate pursuant to D & CL § 282(i).

FN3. Furthermore, our Court of Appeals has held that, “under the plain language of the statute,” a person who creates a trust is not able to benefit from CPLR 5205(c)(1). *Stochastic Decisions, Inc. v. Wagner*, 34 F.3d 75, 83 (2d Cir.1994). While Ondrey relies heavily upon the fact that the funds in the Savings Plan are traceable to a pension plan established by Air Canada, it was Ondrey who created and deposited all funds into the Savings Plan that exists today.

*2 There is also no exemption available for the Savings Plan under D & CL § 282(iii)(2)(e). Such applies to “all payments under a stock bonus plan, pension, profit sharing, or similar plan or contract on account of illness, disability, death, age, or length of service unless (i) such plan or contract, except those qualified

under [any of certain provisions of the Internal Revenue Code], was established by the debtor or under auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose, (ii) such plan is on account of age or length of service, and (iii) such plan or contract does not qualify under [any of certain provisions of the Internal Revenue Code].”

Ondrey argues (1) that the Savings Plan is a “similar plan or contract” within the meaning of that statute and (2) that the Savings Plan was not “established” by him because the funds therein are traceable to the plan previously established by his employer and/or that the Savings Plan is “qualified” under section 408 of the Internal Revenue Code - which governs Individual Retirement Accounts (“IRAs”) - because, as with all Canadian Registered Retirement Savings Plans held by United States residents, United States taxes on income accrued in the Savings Plan are deferred pursuant to a treaty between the United States and Canada. See Internal Revenue Service Revenue Ruling 89-95.

Assuming that the Savings Plan is a “similar plan or contract” within the meaning of section 282(iii)(2)(e),^{FN4} this Court nevertheless finds that the Savings Plan “was established by” Ondrey, that it “is on account of age,” that it “does not qualify under” any of the relevant provisions of the Internal Revenue Code and that, resultantly, it is not exempt under such section. Such conclusions are based upon the undisputed evidence in the record. Firstly, Ondrey testified at an Examination Under Oath conducted June 4, 1998 that he had voluntarily established and transferred all original funds into the Savings Plan; secondly, money therefrom will be available without a tax penalty when Ondrey reaches a certain age; and, thirdly, it is clear that the Savings Plan does not “qualify” under 26 U.S.C. § 408, which specifies that a trust account must be, *inter alia*, “created or organized in the United States” in order to qualify as an IRA. As Judge Kaplan noted, the fact that the treaty between the United States and Canada allows deferral of taxes on income accruing in the Savings Plan does not justify treating such as an IRA in these circumstances. 227 B.R. at 214-215. Based upon the

foregoing, this Court finds that Judge Kaplan correctly found that the funds in the Savings Plan are not exempt from the bankruptcy estate.^{FN5}

[FN4](#). See [Dubroff](#), 119 F.3d at 77-78 (finding that an IRA constitutes a “similar plan or contract” within the meaning of [section 282\(iii\)\(2\)\(e\)](#)). Ondrey maintains that the Savings Plan is analogous to an IRA.

[FN5](#). Interestingly, Canadian Registered Retirement Savings Plans apparently are not subject to exemption from a bankruptcy estate under Canadian bankruptcy law either, according to the Canadian Supreme Court's decision in *Royal Bank of Canada v. North American Life Assur. Co.*, 1996 S.C.R. 325. Record on Appeal, Item 11, ¶ 5 & Exh H. However, neither party has contended that such is relevant to this appeal.

Turning to the limitation of the exemption for the Pension Plan, Ondrey is correct that the “reasonable needs” limitation has been amended out of [D & CL § 282\(iii\)\(2\)\(e\)](#). 1989 N.Y. Laws, ch. 280, § 4. The Trustee argues that the inclusion of a reasonable needs limitation on the exemption of the Pension Plan was nevertheless a proper exercise of Judge Kaplan's discretion in granting such exemption and/or was justified under [CPLR 5205\(d\)](#), which provides such a limitation on exemptions for certain sources of income. This Court disagrees. Firstly, the exemption for the Pension Plan was founded upon [D & CL § 282\(iii\)\(2\)\(e\)](#) and not [CPLR 5205\(d\)](#). [227 B.R. at 213](#). Further, there is no discussion of any justification for a reasonable needs limitation outside of [D & CL § 282\(iii\)\(2\)\(e\)](#) such as would lead this Court to find that Judge Kaplan had exercised any discretion when he decided to impose such. In light of the circumstance that the Bankruptcy Court relied solely upon [section 282\(iii\)\(2\)\(e\)](#) in imposing the reasonable needs limitation, this Court finds that such was error.^{FN6} Consequently, the reasonable needs limitation will be vacated for lack of foundation. On remand, the Trustee is free to seek the imposition of a limitation of the

Pension Plan exemption on other grounds.

[FN6](#). According to Ondrey's Brief on Appeal, “Judge Kaplan acknowledged [at a hearing following the issuance of the November 3, 1998 Order] that he inadvertently failed to address the Debtor's arguments on this point in his Order and requested that the Debtor point such fact out to this Court.”

*3 Accordingly, it is hereby *ORDERED* that the November 3, 1998 Order of Bankruptcy Judge Michael J. Kaplan is vacated insofar as it limited the exemption for the Pension Plan to Ondrey's and/or his dependents' reasonable needs and is affirmed in all other respects.

W.D.N.Y., 1999.

In re Ondrey

Not Reported in F.Supp.2d, 1999 WL 409497 (W.D.N.Y.)

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