

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK**

In re:

CASE NO. 03-24714

LAURA JEAN CARPENTER,

Debtor.

DECISION & ORDER

BACKGROUND

On November 24, 2003, Laura J. Carpenter (the "Debtor") filed a petition initiating a Chapter 7 case. On the Schedules and Statements required to be filed by Section 521 and Rule 1007, the Debtor: (1) indicated that she was a one-third (1/3) owner, as a tenant-in-common, of real property located at 23 Names Road, Rochester, New York (the "Names Road Property"); (2) on Schedule C, claimed a \$10,000.00 exemption for her interest in the Names Road Property, pursuant to New York Civil Practice Law and Rules Section 5206(a) (the "Homestead Exemption Statute"); and (3) indicated that the appraised value of the Names Road Property was \$45,000.00, and it was free and clear of any liens or encumbrances.

The case docket indicates that: (1) Kenneth W. Gordon, Esq. (the "Trustee") was appointed as the Debtor's Trustee; (2) on March 3, 2004, an order was entered discharging the Debtor; (3) on October 4, 2005, an amendment to Schedule C (the "Schedule C Amendment") was filed on behalf of the Debtor by attorney David H.

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Ealy ("Attorney Ealy"), and served on the Trustee and the Office of the United States Trustee (the "UST"); (4) on October 5, 2005, a "Deficiency Notice" was issued by the Bankruptcy Court Clerk's Office (the "Clerk's Office") in connection with the Schedule C Amendment, which indicated that the signature of the attorney for the debtor was required on the perjury statement and that it would not process the Amendment until the deficiency was cured; (5) an October 5, 2005 clerk's note indicates that in furtherance of the Deficiency Notice, Attorney Ealy was advised that a substitution of attorney was required because he was not the attorney of record for the Debtor; (6) on October 7, 2005, the Bankruptcy Noticing Center electronically sent the Deficiency Notice to the Trustee; (7) on October 13, 2005, a substitution of attorney was filed by Attorney Ealy; and (8) no objection to the Schedule C Amendment was filed by either the Trustee or the UST prior to April 11, 2006 when the Debtor filed a motion to compel the Trustee to abandon his interest in the Names Road Property (the "Abandonment Motion").

The Abandonment Motion, which included a copy of the Schedule C Amendment, and was served on the Trustee, the UST and all of the Debtor's creditors, asserted that: (1) the Debtor initially claimed the \$10,000.00 exemption for her interest in the Names Road Property pursuant to the provisions of the Homestead Exemption Statute in effect when she filed her petition on December 31, 2003;

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(2) the Debtor executed and filed the Schedule C Amendment after the Homestead Exemption Statute was amended on August 30, 2005 to increase the exemption to \$50,000.00; (3) the Schedule C Amendment was properly served on the Trustee, who failed to file a timely objection to the Amendment; (4) the value of the Debtor's interest in the Names Road Property was less than the increased \$50,000.00 Homestead Exemption, so there was no non-exempt equity in the Property for her estate; and (5) because there was no non-exempt equity in the Names Road Property, the Debtor's interest in the Property should be abandoned by the Trustee.

On April 18, 2006, the Trustee filed an Objection to the Abandonment Motion, which asserted that: (1) the Trustee had obtained a comparative market analysis that indicated the fair market value of the Names Road Property was between \$90,000.00 and \$100,000.00, so that the Debtor's gross equity in the Property was approximately \$30,000.00, \$20,000.00 more than the Homestead Exemption originally claimed by the Debtor when she filed her petition; (2) because Attorney Ealy was not the attorney of record for the Debtor at the time of the filing of the Schedule C Amendment, the Clerk's Office issued the Deficiency Notice which stated that the Amendment would not be processed; (3) in view of the Deficiency Notice, it was the opinion of the Trustee that the filing of the Amendment was a nullity; (4) although it appeared

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that on October 13, 2005 Attorney Ealy filed a substitution of counsel, that substitution of counsel was never served on the Trustee; (5) Attorney Ealy never filed an amendment to Schedule C after being substituted as the attorney of record for the Debtor; (6) to the extent the Abandonment Motion constituted an amendment to Schedule C, the Trustee objected to the Debtor's claim of an increased Homestead Exemption; and (7) since Section 522(b)(2)(a) provides that the exemptions available to a debtor are only those exemptions in effect at the time of the filing of the petition, the Debtor's claim of an increased exemption over her originally claimed \$10,000.00 Homestead Exemption should be denied.

On April 21, 2006, the Debtor filed a Response to the Trustee's Objection to the Abandonment Motion, which asserted that, even though Attorney Ealy was not the attorney of record for the Debtor at the time the Clerk's Office issued the Deficiency Notice, the Schedule C Amendment, which was properly signed by the Debtor, filed with the Court and served on the Trustee with the good faith belief that the amendment to the Homestead Exemption Statute applied even to debtors who had filed cases before August 30, 2005, was valid.

At the April 26, 2006 hearing on the Abandonment Motion, the Trustee further asserted that: (1) the Schedule C Amendment, filed when the Trustee was actively pursuing the possible administration

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of the Names Road Property, was not filed in good faith; (2) notwithstanding the decision of the United States Supreme Court in *Taylor vs. Freeland and Kronz*, 503 U.S. 638 (1992) ("*Taylor*"), the Court should exercise its equitable Section 105 powers to deny the Abandonment Motion and the Debtor's claim of an increased Homestead Exemption, because, on all the facts and circumstances presented, the Amendment was filed in bad faith, especially since Section 522(b)(2)(a) made the Debtor's eligible exemptions only those in existence at the time of the filing of her petition regardless of any change to the Homestead Exemption Statute after that date; and (3) the Schedule C Amendment was not valid because it was not signed by the attorney of record for the Debtor at the time it was filed with the Court, as required by Rule 9011 and Local Rules of the Court.

DISCUSSION

Based upon all of the facts and circumstances presented the Abandonment Motion is hereby granted for the following reasons:

1. Although some believe it is harsh, the decision of the United States Supreme Court in *Taylor* is very clear - a party in interest, including a Chapter 7 Trustee, may file an objection to a Schedule C claim of exemption only within thirty (30) days after a debtor's meeting of creditors is concluded or

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within thirty (30) days after any amendment, as required by Rule 4003(b).¹

2. The Trustee failed to file an objection to the Debtor's Schedule C Amendment within thirty (30) days after it was served on him, and the Debtor's creditors failed to object to it within thirty (30) days after the Abandonment Motion, which included a full copy of the Schedule C Amendment, was served on them.²
3. The Schedule C Amendment was properly executed by the Debtor and was filed by Attorney Ealy electronically with the Court. The Deficiency Notice, which indicated that the Clerk's Office

¹ Rule 4003. Exemptions

(b) Objections to claim of exemptions.

A party in interest may file an objection to the list of property claimed as exempt only within 30 days after the meeting of creditors held under § 341(a) is concluded or within 30 days after any amendment to the list or supplemental schedules is filed, whichever is later. The court may, for cause, extend the time for filing objections if, before the time to object expires, a party in interest files a request for an extension. Copies of the objections shall be delivered or mailed to the trustee, the person filing the list, and the attorney for that person.

F.R.B.P. Rule 4003 (2006).

² The Court even adjourned the hearing on the Abandonment Motion for the possibility that, within thirty (30) days of its service on them, one of the Debtor's creditors would object to the Abandonment Motion on the grounds that: (1) the Debtor's claim of an increased Homestead Exemption was not valid, in view of Section 522(b)(2)(A); and (2) they had never been served with a copy of the Schedule C Amendment until they were served with the Abandonment Motion. However, none of the Debtor's creditors filed such an objection. If they had, the Court would have sustained the objection based on the provisions of Section 522(b)(2)(A).

would not process the Amendment, which was already electronically filed and served on the Trustee, should not have been issued since: (a) the Amendment contained the Debtor's unsworn declaration under penalty of perjury, as required by this Court's June 9, 1999 Standing Order with regard to amendments (the "Standing Order"); (b) there was a cover sheet filed with the Schedule C Amendment, as required by Local Rule 1009-1³ (the "Local Rule"); (c) the cover sheet was signed by an attorney admitted to practice in this Court; and (d) neither Rule 9011(a),⁴ which specifically excepts

³ Rule 1009. AMENDMENTS OF VOLUNTARY PETITIONS, LISTS, SCHEDULES AND STATEMENTS

1009-1 AMENDMENTS [*General Orders 3/21/88 & 1/8/92*]

Amendments to voluntary petitions, lists (including the mailing matrix), schedules and statements must have a completed "Amendment Cover Sheet" affixed to the front thereof in a form prescribed by the Clerk. No purported amendment of any type will be acknowledged, recognized or processed as such by the Office of the Clerk in the absence of an Amendment Cover Sheet. The term "amendment" includes the delayed initial filing of a schedule, statement, list or other document that discloses the existence of parties-in-interest who were not disclosed in the list of creditors that accompanied the petition. Guidelines regarding amendments are available in the Bankruptcy Court Clerk's Office.

⁴ Rule 9011. SIGNING OF PAPERS; REPRESENTATIONS TO THE COURT; SANCTIONS; VERIFICATION AND COPIES OF PAPERS

(a) *Signature.* Every petition, pleading, written motion, and other paper, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name. A party who is not represented by an attorney shall sign all papers. Each paper shall state the signer's address and telephone number, if any. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

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amendments to schedules, the Local Rule nor the Standing Order required the Schedule C Amendment or the accompanying cover sheet to be signed by the attorney of record.

4. The Trustee could have and should have: (a) made the analysis set forth in the preceding paragraph with respect to the validity of the Schedule C Amendment for the purpose of Rule 4003(b); and (b) in view of the strict rule of *Taylor*, filed a protective objection to the claim of an increased Homestead Exemption, which could have included his various legal and equitable arguments.
5. Although it is correct that the Supreme Court in *Taylor* did not address a possible Section 105⁵ argument, the facts and circumstances of this case would not warrant an exercise of this Court's Section 105 powers as suggested by the Trustee. In view of the August 30, 2005 amendment of the Homestead Exemption Statute, and the uncertainty in October 2005 as to

⁵ Section 105 provides, in part, that:

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, *sua sponte*, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 105 (2006).

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how Bankruptcy Courts, especially those that may be particularly sympathetic to debtors, might rule on its applicability in existing cases, notwithstanding the provisions of Section 522(b)(2)(A), I do not find that the signing, filing and service on the Trustee of the Schedule C Amendment were in bad faith.⁶ Furthermore, the case law in the Second Circuit is clear that Bankruptcy Courts cannot exercise their Section 105 powers in direct derogation of a specific provision of the Bankruptcy Code or Rules, which in this case would include the specific provisions of Rule 4003(b).⁷

6. This Court recently ruled in *In re Hayward*, Ch. 7 Case No. 05-27165 (W.D.N.Y. May 25, 2006) ("*Hayward*"), that the increased Homestead Exemption, although it was to be applied retroactively as to creditors with debts or obligations in existence prior to August 30, 2005 who had not reduced their obligations to judgment, was not available to debtors who filed their bankruptcy cases prior to August 30, 2005. Nevertheless, *Taylor* and Rule 4003(b) trump the provisions of

⁶ Attorney Ealy might very well have thought that the Trustee would file an objection to the Schedule C Amendment and the Court would decide the availability of the increased exemption after the parties made whatever arguments they believed appropriate.

⁷ See *FDIC v. Colonial Realty Co.*, 966 F.2d 57 (2d Cir. 1992).

