

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

In Re:

STEPHEN V. & DEBORAH A. D'ORAZIO,

BK. NO. 92-20840

CHAPTER 7

DECISION AND ORDER

Debtors.

BACKGROUND

On March 30, 1992 the debtors, Stephen V. D'Orazio and Deborah A. D'Orazio (the "Debtors"), filed a voluntary petition initiating a Chapter 7 case. On Schedule B the Debtors listed as an asset an \$18,048.54 IRA (the "IRA") with American Funds Group, indicating that it was an 401K rollover. On Schedule C the Debtors claimed the IRA as fully exempt pursuant to the provisions of Section 282 of the New York Debtor and Creditor Law.

A Section 341 meeting was scheduled for May 5, 1992. After the meeting and on May 5, 1992 the Trustee, pursuant to Rule 4003 of the Rules of Bankruptcy Procedure, filed with the Court an objection to certain claims to exemptions made by the Debtors, including their claim that the IRA was fully exempt. The Trustee's objection was thereafter properly served in accordance with Rule 4003.

On June 1, 1992 an Order was entered directing the Debtors to appear on June 10, 1992 at a Rule 2004 examination to be conducted by First National Bank of Rochester ("First National"). On June 3, 1992 an objection to certain claims to exemptions made by the Debtors, including the Debtors' claim that the IRA was fully exempt, was filed on behalf of First National. By motion dated June 5, 1992 and returnable June 15, 1992, First National moved for an order striking and reducing the claimed exemptions of the Debtors covered by its objection. The First National motion was thereafter adjourned by consent to July 13, 1992.

At the July 13, 1992 hearing on the motion, the parties requested that the Court rule only on

the Debtors' claim that the IRA was fully exempt and the motion was adjourned to July 27, 1992 for both the Court's decision on the exemption of the IRA and argument on the other objections. At the hearing all parties agreed that the IRA was in fact a rollover from a 401K plan, established by one of the Debtor's former employers, which was qualified under Section 401 of the United States Internal Revenue Code of 1986, as amended. The Debtors urged the Court to find the IRA fully exempt in accordance with the decision of Bankruptcy Judge Dorothy Eisenberg. In re Mann, 134 B.R. 710 (Bankr. E.D.N.Y. 1991). The Trustee and First National urged the Court to find that: (1) the IRA is not exempt, even though it is acknowledged it is a rollover from a qualified plan, in accordance with Bankruptcy Judge Eisenberg's earlier decision in In re Iacono, 120 B.R. 691 (Bankr. E.D.N.Y. 1990) which dealt with a simple debtor-created IRA; and (2) even if the IRA is found to be exempt the exemption is limited to \$5,000 in accordance with the limitation set forth in Section 283 of the New York Debtor and Creditor Law.

DISCUSSION

This Court fully agrees with the decision of Bankruptcy Judge Dorothy Eisenberg in the case of In re Mann, 134 B.R. 715 (Bankr. W.D.N.Y. 1992). Judge Eisenberg held that a qualified Keogh or 401K plan which has been appropriately deposited into a subsequent "rollover" IRA continues to have the benefits of the spendthrift trust exemption pursuant to CPLR §5205(c)(2) and (3) and the funds are exempt property. Section 5205(c) of the New York Civil Practice Law and Rules includes in the definition of exempt property payments from "a Keogh (HR-10) retirement or other plan established by a corporation which is qualified under Section 401 of the Internal Revenue Code . . . or created as a result of rollovers from such plans pursuant to sections 402(a)(5), 403(a)(4) or 408(d)(3) of the Internal Revenue Code of 1986. [These assets] shall be considered a trust which has been created by or proceeded from a person other than the judgment debtor." This section was added in 1989, and it was clearly the intention of the New York Legislature to enlarge the definition of exempt property to include an IRA which consisted of rolled over proceeds of a 401K plan.

Therefore the Debtors' IRA is exempt under New York law.

In addition, the IRA is fully exempt. Section 283 of the New York Debtor and Creditor Law governs the available exemptions under CPLR §5205 and provides for a \$5,000 aggregate exemption for certain personal property. This limitation of \$5,000 is only on personal property exempt under CPLR §5205(a) and not CPLR §5205(c) which governs the Debtors' IRA.

CONCLUSION

The Debtors' IRA on deposit with American Funds Group in the amount of \$18,048.54 is fully exempt in accordance with the provisions of Section 5205(c) of the New York Civil Practice Law and Rules, Section 282 of the New York Debtor and Creditor Law and Section 522 of the Bankruptcy Code.

IT IS SO ORDERED.

/s/

HON. JOHN C. NINFO, II
UNITED STATES BANKRUPTCY JUDGE

Dated: July 23, 1992