UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

GARY ONDREY Case No. 97-16356 K

Debtor

This matter is before the Court for a very limited purpose. That purpose is to address the question of whether a specific provision of New York law assures that the Trustee may not liquidate, for the benefit of creditors, the Debtor's interest in a pension plan and retirement savings plan located in Canada. There is about $200,000 in the plans combined. The Debtor is a New York domiciliary, but is a long-time employee of Air Canada. The Debtor asserts that his Air Canada pension and retirement plans, created and maintained under Canadian laws, either are protected by 11 U.S.C. § 541(c)(2) or are exempt property in this bankruptcy case, per 11 U.S.C. § 522's deference to the exemption laws of the state of the Debtor's domicile. The Trustee disagrees.

Of the numerous issues and sub-issues raised in the extensive briefing undertaken by the parties, this decision deals with the narrow question of whether Rule 5205(c)(1) of New York's Civil Practice Laws & Rules ("CPLR"), standing alone, resolves the issue in the Debtor's favor even if he were to fail to show the kind of "restriction" that would assist him under § 541(c)(2).[1] For purposes of this decision only it will be assumed, without deciding, that 11

[1]There are strong parallels between a § 541(c)(2) analysis and an "exemption" analysis under New York law regarding spendthrift trusts. So, some of the following discussion may sound like a § 541(c)(2) "restriction on transfer" discussion. It is not. Nothing found in this Decision precludes an independent analysis of the § 541(c)(2) question.

U.S.C. § 541(c)(2) does not protect the funds from the Chapter 7 Trustee.[2] The parties understand that some of the other matters presented in the briefs may require further briefing or further discovery, but it was agreed at argument on April 8 that it would be useful first for the Court to decide whether CPLR 5205(c)(1) is dispositive of itself. The Court finds that CPLR 5205(c)(1) is not so dispositive.[3]

CPLR 5205(c)(1) states, in pertinent part, that "*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, is exempt from application to the satisfaction of a money judgment.*" N.Y. C.P.L.R. 5205(c)(1) (McKinney 1997 & Supp. 1998). The Debtor argues that "the Air Canada Pension *Plan . . . which was created* by Air Canada, and the Registered Retirement Savings *Plan . . . which was funded entirely* through contributions by Air Canada, are exempt under CPLR 5205(c)(1), irrespective of any provision of the [Internal Revenue Code]."

The Trustee counters by arguing that (c)(1) must be qualified by the remainder of 5205, and that *only* plans that meet the CPLR specifications set forth in (c)(2) are within the scope of the exemption provided by (c)(1). CPLR 5205(c)(2) states:

> For purposes of this subdivision, all trusts, custodial accounts, annuities, insurance contracts, monies, assets or interests established as part of, and all payments from, either

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[2] 11 U.S.C. § 541(c)(2) enforces, in a bankruptcy case, a "restriction on the transfer of a beneficial interest of the debtor in a trust" if that restriction "is enforceable under applicable nonbankruptcy law . . ."

[3] It is not necessary today to reiterate the statutory structure by which CPLR 5205 becomes important to the issue of personal property exemptions in bankruptcy cases involving New York domiciliaries under the Bankruptcy Reform Act of 1978. The parties are well aware of that statutory structure and this decision will focus directly on the issue at hand.

> any trust or plan, which is qualified as an individual retirement account under [the Internal Revenue Code], or a Keogh . . . , retirement or other plan established by a corporation, which is qualified under [the Internal Revenue Code] . . . shall be considered a trust which has been created by or which has proceeded from a person other than the judgment debtor, even though such judgment debtor is (i) in the case of an individual retirement account plan, an individual who is the settler of and depositor to such account plan, or (ii) a self-employed individual, or (iii) a partner of the entity sponsoring the Keogh . . . plan, or (iv) a shareholder of the corporation sponsoring the retirement or other plan.

N.Y. C.P.L.R. 5205(c)(2) (McKinney 1997).

Both arguments miss the mark. The Trustee's argument fails because the self-evident import of (c)(2) is to bring a number of self-settling trusts within the protection of (c)(1). Section (c)(2) broadens (c)(1); it does not narrow it.

The Debtor's argument fails because it ignores key language of other pertinent provisions of New York law. Firstly, New York's statutory exemption scheme begins with Debtor and Creditor Law § 282 which states that a debtor may exempt "personal and real property [which is] exempt from application to the satisfaction of money judgments under sections fifty-two hundred five and fifty-two hundred six of the civil practice law and rules." N.Y. Debt. & Cred. Law § 282 (McKinney 1990 & Supp. 1998). To understand CPLR 5205, we must first examine CPLR 5201. Under that provision "[a] money judgment may be enforced against any property which could be assigned or transferred, whether it consists of a present or future right and whether or not it is vested . . ." N.Y. C.P.L.R. 5201(b) (McKinney 1997). As to the alienability of trusts, we turn to N.Y. Estates, Powers & Trusts Law ("EPTL") § 7-1.5(a). It starts with the command that "[t]he interest of a beneficiary of any trust may be assigned or otherwise transferred, *except*" with respect to certain income interests. In other words, under the

CPLR and the EPTL, unless there is a specific exemption provided for a debtor's interest in a trust (or unless it is a non-assignable income interest), that interest is available to satisfy judgment debts.

In order to be exempt, the judgment debtor's interest in a trust must fall within one of the exceptions provided in CPLR 5205(c).[4] Under CPLR 5205(c)(1), property held in a trust created by someone other than the judgment debtor is exempt from application to the satisfaction of a money judgment only "while held in trust." Once the property is in the hands of the judgment debtor, that provision does not apply. Income in the hands of the debtor, for example, is governed by 5205(d). Income in the hands of the debtor is no longer "held in trust." Similarly, a remainder is not exempt under CPLR 5205(c)(1) once in the hands of the beneficiary.[5]

And what about the power to invade principal? Can trust fund monies be said to be "held in trust" if the debtor/beneficiary has the power to invade the corpus of the trust? Under New York law, the power of a beneficiary to compel invasion of principal permits creditors to levy to the extent of that power. *See Alexandre v. Chase Manhattan Bank*, 61 A.D. 2d 537, 539-40 (1978) (whatever a judgment debtor can reach, can be reached by a judgment creditor);

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[4] As stated at the outset, this decision deals only with 5205(c)(1). There are, of course, exemptions for certain self-settled trusts found in 5205(c)(2) which will not be discussed here.

[5] "The statutory exemption of trust principal from being applied to the debts of a remainderman makes the property exempt only so long as the property is held in trust, and when the principal is to be distributed outright to remaindermen, the property so distributed may be reached by judgment creditors." 59 N.Y. Jur. 2d *Exemptions* § 20 (1987) (citing *In re Owen*, 254 N.Y.2d 974 (1964); Laborers Union Local v. Frank L. Lyons & Sons, Inc., 323 N.Y.2d 229 (1971); *In re Chusid's Estate*, 361 N.Y.S. 2d 766 (1969)); *see also Sherman v. Kirshman*, 261 F.Supp. 858 (S.D.N.Y. 1966); Margaret Valentine Turano, *Practice Commentaries*, N.Y. Est. Powers & Trusts Law § 7-1.5 (McKinney 1992).

Sheehan v. Sheehan, 395 N.Y.S.2d 596, 597 (Sup. Ct. 1977) ("monies due and payable to the settlor/[debtor] upon demand . . . are . . . available for attachment by his creditors"); *Lerner v. Williamsburg Savings Bank,* 386 N.Y.S.2d 906, 908-909 (Civ. Ct. 1976) (despite adverse tax consequences, funds accessible by debtor are subject to attachment).[6] In sum, CPLR 5205(c)(1) does not assist a nonbankrupt debtor who is free to compel the fiduciary to withdraw the corpus of the trust at the debtor's discretion.

The principles favoring access to such funds seem even more compelling in a bankruptcy case. It appears to this writer that because 11 U.S.C. § 541 vests in the bankruptcy trustee all powers that a debtor had, except for those powers that the debtor could exercise solely for the benefit of someone else, *11 U.S.C. § 541(b)(1),* it follows that a debtor's power to withdraw trust corpus or to cause it to be withdrawn is exercisable by the bankruptcy trustee, thereby taking the funds out of the scope of the phrase "held in trust." To rule otherwise would be to rule that a debtor in bankruptcy has an exemption for "cash" that is not limited to $2500 by N.Y. Debtor and Creditor Law § 282(3). It would be unlimited, so long as at the moment of filing of the Chapter 7 petition, the cash had not yet been withdrawn from a bank account set up in someone else's name at someone else's initiation. Such a trust subject to complete invasion at a debtor's request is nothing but cash in the bank. In light of the specific bankruptcy limitation contained in Debtor and Creditor Law § 282 (3), the more general rule of CPLR 5205(c)(1) would fall to the more specific bankruptcy exemption provision, even if the general rule were

[6]This Court recognizes that these cases involve the types of trusts which now may have been specifically exempted by 5205(c)(2). The analysis contained in these cases, however, is important in understanding the default rules to apply to the types of trusts which have not been so specifically exempted.

more generous to a non-bankrupt debtor.

Whether the Debtor here has a power to compel invasion is yet undetermined. For present purposes, it need only be concluded, as the Court here orders, that CPLR 5205(c)(1), standing alone, does not resolve the present dispute in the Debtor's favor. The Trustee shall have the discovery he requests before there is briefing on the subject of what the "applicable nonbankruptcy law" is for purposes of § 541(c)(2)[7] and before any further argument over whether facts surrounding the funds in question might ultimately bring them within the scope of CPLR 5205(c)(1).

Discovery shall be completed by June 19, 1998. The matter is set for a report back at 10:00 a.m. on June 24, 1998 in Buffalo.

SO ORDERED.

Dated: Buffalo, New York
April 28, 1998

/s/ Michael J. Kaplan

U.S.B.J.

[7]As noted at argument, the Court is of the view that "applicable nonbankruptcy law" does not include Canadian law unless the United States principles of comity among nations, or treaties, so directs. "Applicable law" for § 541(c)(2) purposes is our Nation's law regarding recognition of Canada's laws "restricting transfer" of an interest in connection with the satisfaction of money judgments.