UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

IN RE:	)	CHAPTER 7
	)	CASE NO. 03-43255-JDW
ADRIAN JON SPICE,	)	
	)	
DEBTOR.	)	

BEFORE

JAMES D. WALKER, JR.

UNITED STATES BANKRUPTCY JUDGE

COUNSEL

For Debtor:	Teresa Carswell Howard Post Office Box 1478 Columbus, Georgia 31902-1478
For U.S. Foodservice, Inc.:	James W. Martin One Securities Centre, suite 300 3490 Piedmont Road, NE Atlanta, Georgia 30305

MEMORANDUM OPINION

This matter comes before the Court on Debtor's amendment of schedules. This is a core matter within the meaning of 28 U.S.C. § 157(b)(2)(B). After considering the pleadings, the evidence, and the applicable authorities, the Court enters the following findings of fact and conclusions of law in conformance with Federal Rule of Bankruptcy Procedure 7052.

Findings of Fact

The origins of this case lie in a garnishment against Debtor Adrian Spice's bank account. U.S. Foodservice, Inc. obtained a judgment against Debtor in the Superior Court of Muscogee County, Georgia, on October 20, 2003. On December 15, 2003, U.S. Foodservice served the garnishment on Columbus Bank & Trust ("CB&T"), which froze Debtor's account in response.

Debtor filed a Chapter 7 petition on December 23, 2003, listing a judgment debt to U.S. Foodservice in the amount of $14,993.19. On Schedule B, he listed a checking account at CB&T with $10 and a savings account at CB&T with $5. He also listed those amounts as exempt on Schedule C. On December 29, 2003, U.S. Foodservice filed a notice of the bankruptcy filing in the state court to stay the garnishment.

On January 8, 2004, Debtor filed a motion to terminate the garnishment and to order the release of funds subject to the garnishment. The Court held a hearing on the motion on February 5, 2004. At that hearing, Debtor's counsel, Teresa Howard, indicated that Debtor had more than $15 in his bank accounts at the time the garnishment was served and the

bankruptcy case was filed. However, she did not know how much money was in the accounts. Ms. Howard also said that she believed, but was not certain, that money subject to the garnishment had been released by CB&T to Debtor. The Court stated that because the state court had been notified of the bankruptcy, Debtor's motion to terminate the garnishment did not seem necessary and that the more appropriate course of action would be for Debtor to amend his schedules and file an adversary proceeding to avoid U.S. Foodservice's judicial lien. At the conclusion of the hearing, the Court terminated the motion and instructed the parties to sort out the facts and then follow the appropriate procedural avenues.

On February 6, 2004, James Martin, counsel for U.S. Foodservice sent a letter to Ms. Howard to confirm that she would determine the balance of Debtor's checking account on the date the bankruptcy case was filed and provide him with that information. Mr. Martin sent a follow-up letter on February 20, 2004, to inquire why Ms. Howard had not yet provided the bank account balance. On March 1, 2004, Mr. Martin subpoenaed the information directly from CB&T and learned that Debtor had approximately $6,040 in his checking account at the time of garnishment and bankruptcy filing.

On April 12, 2004, the Court entered orders discharging Debtor and closing the case. Almost one year later, on March 31, 2005, Debtor filed a motion to reopen the case so he could file a motion to hold U.S. Foodservice in contempt and file a motion to avoid U.S. Foodservice's judicial lien. Debtor's actions were precipitated by U.S. Foodservice's efforts to revive the garnishment. On March 28, 2005, Mr. Martin wrote CB&T requesting that CB&T answer the garnishment. In response, CB&T froze Debtor's accounts and tendered

the balance, $3,825.20, to the registry of the Court. U.S. Foodservice conceded that it had no interest in those specific funds because Debtor obtained them postpetition, and the parties ultimately agreed to a consent order releasing the funds to Debtor.

The Court held a hearing on Debtor's motion to reopen the case on April 4, 2005. U.S. Foodservice opposed reopening the case. Also on April 4, 2005, Debtor filed an amended Schedule B, showing his CB&T checking account with $6,041.42, an amended Schedule C, claiming an exemption in the checking account for $5,589, pursuant to O.C.G.A. § 44-13-100(a)(6), and a motion to avoid U.S. Foodservice's judicial lien. The Court granted the motion to reopen based on the need to administer the previously unreported checking account balance and appointed a trustee.[1]

On May 16, 2005, the Court held a hearing on Debtor's motion to avoid U.S. Foodservice's judicial lien. One issue raised during the hearing was whether the Court should disallow Debtor's exemption amendment because it was filed more than a year after the Court indicated to Ms. Howard that an amendment was necessary.

Ms. Howard has taken responsibility for the failure to amend schedules. She stated that her husband and law partner died unexpectedly of a heart attack on April 7, 2003, which threw the law practice into chaos for about a year. She first consulted with Debtor on December 19, 2003, about seven months after her husband's death. On a client information form Ms. Howard provided to Debtor, he listed a checking account with CB&T. In parentheses, he wrote "garnish" and indicated a balance of $6,038. Ms. Howard said she did

[1] Judge John T. Laney, Jr. was assigned to this case originally, and he presided over the hearings on February 5, 2004 and April 4, 2005. He recused himself by order of April 5, 2005.

not know why the $6,038 was not listed on the bankruptcy schedules, although she speculated that the employee who transferred the information to the bankruptcy petition may have assumed that because the amount was garnished, it was not available. Although Ms. Howard reviewed the schedules prior to filing them, she apparently did not notice the error. She had no explanation for the long delay in filing amendments other than the general turmoil in the wake of her husband's death.

Conclusions of Law

A debtor may avoid a judicial lien to the extent it impairs an exemption. 11 U.S.C.A. § 522(f)(1) (West 2004). At issue in this case is whether Debtor should be permitted to amend his schedules to claim an exemption that would serve as the basis for avoiding a judicial lien. Pursuant to Federal Rule of Bankruptcy Procedure 1009(a), "[a] voluntary petition, list, schedule, or statement may be amended by the debtor as a matter of course at any time before the case is closed." Courts recognize two well-established judicial exceptions to this rule: either the debtor acted in bad faith with respect to the amendment or a creditor will suffer prejudice as a result of the amendment. Kaelin v. Bassett (In re Kaelin), 308 F.3d 885, 889 (8th Cir. 2002); Lowe v. Sandoval (In re Sandoval), 103 F.3d 20, 22 (5th Cir. 1997); Calder v. Job (In re Calder) 973 F.2d 862, 867 (10th Cir. 1992). See also Doan v. Hugdins (In re Doan), 672 F.2d 831, 833 (11th Cir. 1982) (construing predecessor to Rule 1009(a)). If either exception is proved, the Court may disallow the amendment.

No interested party has made an allegation of bad faith, and the Court can find no evidence of bad faith in the facts. The most obvious example of bad faith is intentional

concealment of an asset. See In re Rolland, 317 B.R. 402, 415 (Bankr. C.D. Cal. 2004). But, it may also be shown by a "debtor's deliberate and intentional delay in amending an exemption in order to gain an economic or tactical advance [sic] at the expense of creditors and interests of the estate ...." In re Kauffman, 299 B.R. 641, 644 (Bankr. M.D. Fla. 2003). As in Kauffman, the failure to list the $6,038 on Schedules B and C was attorney error and not due to any bad faith by Debtor. Id. In fact, Debtor disclosed the full balance of his checking account to Ms. Howard prior to filing the petition. Furthermore, he gained no tactical advantage by the delay; rather he reaps the same benefit from amending his schedules today that he would have received had he filed the amendments a year ago. Thus, bad faith on the part of Debtor cannot be a basis for denying Debtor's right to amend.

Similarly, no creditor is prejudiced by the amendments. In Doan, the Eleventh Circuit stated that neither mere delay in amending nor the grant of an exemption based on the amendment constitutes prejudice. 672 F.2d at 833. See also Goswami v. MTC Distrib. (In re Goswami), 304 B.R. 386, 394 (B.A.P. 9th Cir. 2003) (allowing debtors to reopen their case, amend their exemptions, and avoid a lien five years after they received a discharge). If, however, "the parties would have taken different actions or asserted different positions had the exemption been claimed earlier, and the interests of those parties are detrimentally affected by the timing of the amendment, then the prejudice is sufficient to deny amendment." In re Talmo, 185 B.R. 637, 645 (Bankr. S.D. Fla. 1995). An amendment may also be prejudicial "if it impairs a trustee in the diligent administration of the estate." Id. U.S. Foodservice's best argument for prejudice is that it will lose its judicial lien if Debtor is allowed to amend his schedules. But, it has not shown that it changed its position in any

way in reliance on the original schedules. The Bankruptcy Code allows a judicial lien to be avoided if it impairs an exemption. U.S. Foodservice wants to benefit from Debtor's error; rather, it does not want to lose what it gained through Debtor's inadvertence. The fact that rectifying that error subjects U.S. Foodservice to a provision of the Code does not constitute prejudice.

The Court has been concerned that Debtor's counsel has not complied with previous instructions of this Court. While the Court is sympathetic to Ms. Howard's personal circumstances, they cannot fully justify her neglect. Nevertheless, her neglect does not provide a legal basis to disallow the amendments.

For the foregoing reasons, the Court will allow Debtor to amend his schedules. Pursuant to Federal Rule of Bankruptcy Procedure 4003(b), parties in interest will have 30 days after the amendment is filed to object to the amended exemption. The amendment shall be deemed to be filed on the date of entry of this Opinion and accompanying Order. The Court will postpone ruling on Debtor's motion to avoid judicial lien until the amended exemption has been conclusively established.

An Order in accordance with this Opinion will be entered on this date.

Dated this 11th day of July, 2005.

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James D. Walker, Jr.
United States Bankruptcy Judge

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ORDER

In accordance with the Memorandum Opinion entered on this date, it is hereby ORDERED that the amendments to Schedules B and C submitted by Debtor shall be allowed, and it is further hereby ORDERED that the amendments shall be deemed filed as of the date of entry of this Order.

So ORDERED, this 11th day of July, 2005.

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James D. Walker, Jr.
United States Bankruptcy Judge