

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

IN RE:)
)
NORMAN ERIC NELSON,) CASE NO. 05-65439 JPK
) Chapter 7
) Debtor.)

NORMAN ERIC NELSON,)
)
) Plaintiff,)
)
) v.) ADVERSARY NO. 06-6202
)
STACIA YOON, TRUSTEE,)
)
) Defendant.)

MEMORANDUM OF DECISION/JUDGMENT

This adversary proceeding came before the Court for hearing on August 17, 2007. The plaintiff appears by counsel George Livarchik; the defendant appears personally.

The complaint requests a declaratory judgment as to two matters. The first is whether a security deposit provided by the debtor prior to the filing of the Chapter 7 petition with respect to a lease of residential real estate may be recovered by the Chapter 7 Trustee for the benefit of the estate. The second issue is whether the debtor may recover from property of the estate a portion of tax preparation expenses incurred by the debtor with respect to the preparation of the tax return from which a tax refund in which the estate has an interest was derived.

For the reasons stated on the record in open court at the hearing held on August 17, 2007, pursuant to Fed.R.Bankr.P. 7052/Fed.R.Civ.P. 52(a), the Court determines that the tax preparation expenses are not recoverable in any part from property of the estate, and do not in any manner constitute an administrative claim against the estate. As explained by the Court at the hearing, these expenses were incurred personally by the debtor with respect to a professional person, as defined by 11 U.S.C. § 327(a), not first approved by the Court to act as

a professional person in this case. The debtor's unilateral decision to engage a professional without involvement by the Trustee or the Court completely deprived the Chapter 7 estate of any opportunity to review the need for a professional's involvement; any opportunity to determine the scope of any services to be provided; and any opportunity to negotiate concerning the fee to be charged – the very reasons for the existence of 11 U.S.C. § 327 and Fed.R.Bankr.P. 2014. Additionally, the request by the debtor to reimburse the debtor completely bypasses the review mechanisms of 11 U.S.C. § 330 and Fed.R.Bankr.P. 2016. Moreover, the expenses were necessary for the debtor to realize any interest himself in the tax refund, a significant part of which constitutes property of the debtor exclusive of the interests of his Chapter 7 bankruptcy estate. Under the law applicable to Chapter 7 cases provided by both Titles 11 and 26 of the United States Code, it was the debtor's – not the Chapter 7 Trustee's – obligation to prepare and file the subject tax return. As a result, the preparation expense was not a "necessary" expense "of preserving the estate" as required by 11 U.S.C. § 503(b)(1)(A), and the circumstances of its incursion do not place it within any other provisions of § 503(b).

With respect to the security deposit, as stated on the record in open court pursuant to Fed.R.Bankr.P. 7052/Fed.R.Civ.P. 52(a), the lease (a copy of which is attached to the plaintiff's complaint) designates the deposit as a security deposit, and there is nothing in this document which effects a transfer of ownership interest in the deposit to the landlord. There is thus nothing in the contractual agreement between the parties which removes the nature of this deposit from the scope of I.C. 32-31-3-9, which as a matter of law establishes that the debtor retains the interest in the deposit at the time of its provision to the landlord. The security deposit thus constituted property of the debtor's bankruptcy estate pursuant to 11 U.S.C. § 541(a)(1) on the date of the filing of the debtor's case. The decision of this Court in *In re Coffey*, 339 B.R. 689 (Bankr. N.D.Ind. 2006) does not in any manner address or determine issues relating to the property interests of the Chapter 7 bankruptcy estate in a security deposit

given to the landlord under a lease of residential real estate. By operation of Indiana law, the legal interest in the deposit amount remains in the debtor until the landlord undertakes the actions required by I.C. 32-31-3-12, et seq. If, as is hardly ever the case, the deposit was actually placed in a segregated account, the legal interest in the fund in that account would remain in the lessee until application pursuant I.C. 32-31-3-12, et seq. If, as more usually happens, the lessor uses the deposit for his own purposes – then the lessor is indebted to the lessee for the return of the deposit at the end of the leasehold, with that debt being subject to reduction by means of the statutory charging process. This contingent right to return of the deposit is essentially a "chose in action": "one definition of a 'chose in action' is the 'right to receive or recover a debt, demand, or damages on a cause of action *ex contractu* or for a tort or omission of a duty'. *Black's Law Dictionary*, 219 (5th Ed. 1979)"; *Picadilly, Inc. v. Raikos*, Ind., 582 N.E.2d 338, 339 (fn. 1) (1991). As a chose in action, the lessee's interest is an interest in intangible personal property – *Vawter v. Griffin*, 40 Ind. 593 (1872) – and as such is subject to exemption only under I.C. 34-55-10-1(c)(3)¹. As in essence a debt owed by the landlord to the tenant, setoff considerations may arise under 11 U.S.C. § 553 with respect to provable pre-petition debts owed by the tenant to the landlord within the provisions of I.C. 32-31-3-13. However, that is not the case presented on this record.

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff is not entitled to recovery of any amount from the Chapter 7 bankruptcy estate with respect to expenses of tax preparation.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the \$700.00 security deposit constitutes property of the debtor's Chapter 7 bankruptcy estate, either in the form of a

¹ The entire amount is recoverable by the Trustee from the landlord (subject to potential rights of setoff of the lessor), and if an exemption in the deposit is properly claimed by the debtor, the exempted amount of the deposit recovered from the lessor is payable by the estate to the debtor, as contrasted to the lessor's retention of the exempted amount.

segregated fund held by the lessor, or as a chose in action against the lessor. The estate's interests in the deposit constitutes intangible personal property, subject to I.C. 34-55-10-1(c)(3) if such exemption is properly claimed.

Dated at Hammond, Indiana on September 6, 2007.

/s/ J. Philip Klingeberger
J. Philip Klingeberger, Judge
United States Bankruptcy Court

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