

IN RE:

VICKI LEE DION,

Debtor.

Case No. 97-11396
Chapter 7

GLEB GLINKA, CHAPTER 7 TRUSTEE,

Plaintiff,

AP No. 99-01017

v.

SMITH BELL & THOMPSON, INC.
and SMITH BELL & THOMPSON, INC.
ESOP TRUST,

Defendants.

APPEARANCES:

Gleb Glinka, Esq., Glinka & Schwidde, P.O. Box 7, Cabot, VT 05647, for Gleb Glinka, Chapter 7 Trustee.

James E. Preston, Esq., Pierson Wadhams, Quinn & Yates, 53 South Union Street, Burlington, VT 05401, for Smith Bell & Thompson, Inc. and Smith Bell & Thompson, Inc. ESOP Trust.

**MEMORANDUM OF DECISION ON
MOTION FOR SUMMARY JUDGMENT¹**

I.

Procedural Background

On February 3, 1999, Gleb Glinka (“Plaintiff” or “Trustee”), chapter 7 trustee of

¹ This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(E).

the estate of Vicki Lee Dion (“Debtor”), filed a complaint against Smith Bell & Thompson, Inc. (“SB&T”) demanding the turnover, pursuant to 11 U.S.C. § 542(a), of Debtor’s interest in an employee stock ownership plan (“ESOP”) administered by SB&T. The complaint was thereafter amended to add defendant Smith Bell & Thompson, Inc. ESOP Trust (the “ESOP Trust,” and collectively with SB&T, “Defendant”). On February 18, 1999, Defendant filed its answer, in short, denying that it holds property of the estate subject to the turnover provisions of § 542(a). In its affirmative defenses, Defendant contends that Debtor’s interest in the ESOP, while vested, is subject to a contractual distribution regime entitling Debtor to distributions in 1/5th increments commencing in 2002. Defendant further contends that the ESOP precludes acceleration of distributions except in circumstances inapplicable here.

By stipulation dated April 1, 1999, the parties agreed that the dispute, which they framed as whether Trustee had the right to compel the turnover of the present value of Debtor’s interest in the ESOP despite the language of the ESOP documents, could be decided as a matter of law. By stipulation dated May 19, 1999, the parties set forth their agreed facts (the “fact stipulation”). The parties agreed to file briefs in support of their positions. Thereafter, on September 1, 1999, Plaintiff filed a memorandum in support of his complaint, to which Defendant countered with a motion for summary judgment and separate memorandum on September 24, 1999. The parties each filed an additional pleading in opposition/support. In its pleadings, Defendant questioned whether Debtor’s ESOP interest was even property of the estate given the excepting language of § 541(c)(2) of the Bankruptcy Code with respect to spendthrift trusts. Plaintiff demurred, arguing that Debtor was the proper party to raise that issue and, further, that the issue was not before the Court.

By letter dated May 11, 2000, the Court requested that the parties supplement the fact stipulation with information concerning, provide any evidence with respect to, and further brief the issue of, whether Debtor's ESOP interest was excluded from property of the estate by virtue of § 541(c)(2) of the Bankruptcy Code or subject to exemption under 12 V.S.A. § 2740(16). By letter dated May 25, 2000, counsel for the Defendant requested that the Court decide the motion based solely on the issue of whether Trustee had the right to compel the turnover of the present value of Debtor's interest in the ESOP despite the language of the ESOP documents. By supplemental memorandum dated June 15, 2000, the Plaintiff asserted that no evidence had been presented on whether the ESOP was ERISA-qualified and that Debtor, whom had listed it as exempt only in the amount of \$10,000 in her schedules, was the proper party to argue the issue but had failed to do so.

As explained below, the Court holds that (i) as a matter of law, Trustee has no greater rights than Debtor with regard to Debtor's interest in the ESOP, (ii) Debtor's bankruptcy filing does not meet the contractual requirements necessary for acceleration of the ESOP interest, and (iii) accordingly, Trustee may not compel the turnover of the present value of Debtor's interest in the ESOP. Therefore, Defendant's motion for summary judgment is granted.²

II.

Material Facts

On September 19, 1997, Debtor filed a Chapter 7 bankruptcy petition, listing her

² Although the merits of whether Debtor's interest in the ESOP is excluded from property of the estate under § 541(c)(2) of the Bankruptcy Code is not addressed herein, to the extent Debtor's interest in the ESOP is excluded from property of the estate under § 541(c)(2) of the Bankruptcy Code and relevant case law, such as Patterson v. Shumate, 504 U.S. 753, 112 S.Ct. 2242, 119 L.Ed. 2d 519 (1992), it is not available for distribution to creditors.

ESOP interest in the amount of \$76,000 on Schedule B (personal property), and asserting an exemption of \$10,000 of her ESOP interest on Schedule C (exemptions). Shortly thereafter, Gleb Glinka was appointed as chapter 7 trustee.

On May 19, 1999, the parties filed their fact stipulation, pursuant to which the Court adopts, verbatim, the following enumerated facts:

1. Debtor was employed by SB&T between June 1, 1986 and April 1, 1996. Having been employed SB&T for more than seven years, Debtor was a fully vested participant in the ESOP (ESOP § 10(a)(2)).
2. When she terminated her employment with SB&T, Debtor had a vested interest in 87.43380 shares of those shares of SB&T stock owned by the ESOP.
3. Pursuant to § 12(b) of the ESOP, having voluntarily terminated her employment, Debtor will become entitled on December 31, 2002, to begin receiving distribution of her vested shares. December 31, 2002, is the last day of the sixth plan year following the 1996 plan year in which she terminated her employment.
4. The ESOP Trustees have elected to distribute the vested shares of each plan participant in equal annual installments over a 5-year period. Distributions to Debtor are scheduled to be made on December 31st in the years 2002, 2003, 2004, 2005 and 2006.
5. On each distribution date, the Company will redeem for cash one fifth of the vested shares. Pursuant to § 17(c)(9) of the ESOP, each annual redemption price will be based on the appraised value of the Company Stock as of the preceding December 31st.
6. The first valuation date in Debtor's case is scheduled to be December 31, 2001. The value of Company Stock as of that date will be determined by professional appraisal in the year 2002.

ESOP § 12(b) provides that if a participant's service terminates for any reason other than retirement, disability, or death, the distribution of vested shares shall commence no later than December 31st of the sixth plan year following the employee's termination of services. At that point, the ESOP trustees have discretion to distribute in a lump sum or in equal

installments over a period of years. Retirement is defined by ESOP as “Termination of service (1) on or after attaining age 65 or (2) on or after attaining age 62 and completing at least 10 years of credited service.” ESOP § 2. Disability is defined by ESOP as a “physical or mental condition of a participant resulting from bodily injury, disease, or mental disorder which renders him incapable of continuing his usual and customary employment with the Company, as determined by a licensed physician chosen or approved by the Trustee.” Id.

III.

Law

The Bankruptcy Code explains that “[t]he commencement of a case under section 301, 302 or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held” 11 U.S.C. § 541(a). In short, the estate is comprised of all legal and equitable claims and interests of the debtor in or against property, whether tangible, intangible, choate or inchoate. See id.

“Bankruptcy recognizes state property rights, and filing bankruptcy cannot give a debtor a greater interest in an asset than that which he owned pre-bankruptcy.” Gendreau v. Gendreau (In re Gendreau), 122 F.3d 815, 819 (9th Cir. 1997). Furthermore, with respect to property of the estate, “the [t]rustee stands in the shoes of the debtor and has no more and no less interest than that which the debtor had as of the date of the filing of the petition.” In re Rerisi, 172 B.R. 525, 527 (Bankr. E.D.N.Y. 1994); accord In re Paolo Gucci, et al., 174 B.R. 401, 412 (Bankr. S.D.N.Y. 1994) and Goldin v. Primavera Familienstiftung, TAG Assoc., Ltd. (In re Granite Partners, L.P.), 194 B.R. 318, 323 (Bankr. S.D.N.Y. 1996).

Subject to certain exceptions, the Bankruptcy Code directs third parties in

possession of property of the estate to turn such property over to the trustee:

Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

11 U.S.C. § 542(a).

Plaintiff requests the Court to direct Defendant to turn over the present value of Debtor's ESOP interest in accordance with § 542(a) of the Bankruptcy Code. Defendant argues that § 542(a) is not applicable for either of two reasons -- that Debtor is not entitled to a distribution at this time and/or that Debtor's ESOP interest is not property of the estate.³

IV.

Discussion

According to Plaintiff, bankruptcy is an "unforeseeable emergency" tantamount to a "disability," and, thus, a cause for accelerated distribution under ESOP § 12. Somewhat alternatively, Plaintiff argues that under general "equitable principles applicable in bankruptcy" the Court should provide him with the means necessary to access Debtor's ESOP interest.

Defendant argues that "disability" is clearly defined in the ESOP and does not include bankruptcy. Defendant asserts that the ESOP trustees are required by the Employee Retirement Income Security Act of 1974 ("ERISA") to discharge their fiduciary duties "in accordance with the documents and instrument governing the plan." 29 U.S.C. § 1104(a)(1)(D).

³ As noted at Part I hereof, the parties chose not to further address Defendant's latter argument, concerning § 541(c)(2) of the Bankruptcy Code, and, therefore, the remainder of this decision will only address the former argument, concerning timing of distribution.

Accordingly, as early distributions may only be made in circumstances of retirement, disability or death, the ESOP Trustees have no discretion to make early distributions because of bankruptcy.

Plaintiff relies on In re Council, 122 B.R. 64 (Bankr. S.D. Ohio 1990), where the court granted the trustee's request for turnover of the debtor's interest in a deferred compensation plan. There, the deferred compensation plan allowed participants access to their deferred wages in the event of an "unforeseeable emergency." The Council court determined that bankruptcy fit within the broad definition of "unforeseeable emergency." Council, 122 B.R. at 67-68.

_____ Here, the ESOP's definition of "disability" is specific, concerning physical or mental health.⁴ As the ESOP contains no acceleration provision similar to Council's unforeseeable emergency language, Council is not apposite. Further, as Plaintiff has no greater rights than Debtor with respect to property of the estate, and Debtor cannot accelerate distribution of her ESOP interest, Plaintiff's request for an order of this Court directing acceleration pursuant to § 542(a) of the Bankruptcy Code is denied. Plaintiff shall receive distributions of Debtor's ESOP interest, if at all, in accordance with the terms of the ESOP.

⁴ See supra text at Part II.

_____ V.

Conclusion

For the reasons set forth above, the court grants Defendant's motion for summary judgment.

SO ORDERED.

Dated at Rutland, Vermont this 26th day of June, 2000

/s/ Colleen A. Brown
Colleen A. Brown
UNITED STATES BANKRUPTCY JUDGE