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U.S. BANKRUPTCY COURT

New Mexico

Notice of Electronic Filing

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Case Name: Premier Financial Services-Texas, L.P. et al v. Rochester
Case Number: 93-01191-s
Document Number: 106

Docket Text:
Findings of Fact and Conclusions of Law (RE: related document(s)[34] Application filed by Plaintiff The Cadle Company Plaintiff for Writ of Garnishment. (tas)) (jeb)

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:j:\ace\x.pdf
Electronic document Stamp:
[STAMP bkecfStamp_ID=1021991579 [Date=4/16/2008] [FileNumber=1332309-0
] [0fe637e3eea0e3e15dd7d68472678cc7ce9e9f1e9248122fa6d8d779e99d15d3b7f
c1ece51566add68d1efab8e100d984f64c58ea610da6bc30dc34baa605476]]

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
LOUIS PAUL ROCHESTER,
Debtor. No. 7-93-10946 SR

THE CADLE COMPANY,
Plaintiff,
v. Adv. No. 93-1191 R

LOUIS PAUL ROCHESTER,
and
LUANNE ROCHESTER[1],
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came before the Court for trial on the merits of Plaintiff's garnishment action against Defendants. Plaintiff appeared through its attorney Gordon Rowe. Defendants appeared through their attorney Charles Hawthorne. This is a core proceeding. 28 U.S.C. § 157(b)(2)(I).

FACTS

1. Paul Rochester ("Debtor") filed a voluntary chapter 7 proceeding on March 19, 1993.
2. Premier Financial Services-Texas, LP ("PFS") timely filed this adversary proceeding against Debtor.
3. Debtor and PFS entered into a Compromise and Settlement Agreement ("Agreement") which was approved by the Court on August 9, 1996. The Agreement called for certain payments by Debtor and spelled out remedies in the event of default.

[1]Luanne Rochester was joined as a defendant by Order entered September 13, 2006. Doc 56.

4. The Cadle Company ("Cadle") is successor in interest to PFS. See Affidavit, doc 31.

5. On October 16, 2000 Cadle filed an affidavit of default because it had not received payments pursuant to the Agreement.

6. On November 8, 2000, the Court entered a Stipulated and Default Judgment based on the Agreement, awarding Cadle a $200,000 principal judgment plus $35,777.87 in accrued interest, to accrue interest thereafter at 10% per annum and declaring the entire judgment nondischargeable.

7. On February 1, 2006, Cadle applied for a writ of garnishment directed to City Bank New Mexico as garnishee. Doc 34.

8. The Clerk issued a Writ of Garnishment on February 2, 2006 (doc 35), and Garnishee City Bank New Mexico filed an answer ("Answer") on February 24, 2006 (doc 38). The Answer states, in part:

> As of February 24, 2006, Garnishees has the following sums of money in each of the following respective accounts, which the judgment debtor may have claim to some or all of the funds maintained therein:
> a. Account #80326062, titled in the names of Louis Paul Rochester and Luanne M. Rochester, in the amount of $1,003.13.
> b. Account # 80328898, titled in the names of Louis Paul Rochester and Luanne M. Rochester, in the amount of $18,560.37.

9. On September 13, 2006, the Court entered an Order joining Luanne M. Rochester as a defendant, awarding City Bank New Mexico its attorney's fees and costs of $3,966.30, and

authorizing City Bank New Mexico to interplead by depositing the balance of $15,597.20 into the Court registry where it remains to this date.

10. Debtor admits that account 80326062 was his account. Doc 81. Debtor and Luanne claim that account 80328898 is her separate property account and not subject to the garnishment.

11. Debtor's debt to Cadle arose before his 1993 bankruptcy.

12. Debtor and his wife married in 1995. Plaintiff's Exhibit 5.

13. Plaintiff's Exhibit 2 is the signature card for account 80328898. This checking account is a "Multiple-Party Account with Right of Survivorship", owned by "Luanne M. Rochester [and] Paul Rochester". The tax I.D. number associated with the account is Luanne's. Both Luanne and Paul Rochester signed the signature card. Under "Deposit Account Terms and Conditions[2]" it states, among other things, "Multiple Party Account - Parties own the account in proportion to their net contributions unless there is clear and convincing evidence of a different intent."

14. Debtor testified at the trial of this matter that account 80328898 was Luanne's account and that his name was on the account only to give him access in the event of her death.

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[2]This is, of course, a contract between the bank and the depositor(s) and is not binding on third parties such as creditors.

He never wrote checks on this account and never deposited any funds into the account. The funds in account # 80328898 are what is left from a $24,000 gift[3] to Luanne from Debtor's parents in January, 2006. See Defendant's Exhibit 2 and 4.

15. Because the funds in both accounts were added together for submission to the Court, and City Bank's fees and costs of $3,966.30 were subtracted from the whole, the Court has allocated the costs and fees, and the interest earned on the registry account, in accordance with the relative amounts of the funds on deposit, as follows:

	Acct. 80326062	Acct. 80328898	Total
Balance 2/24/06	$1,003.13	$18,560.37	$19,563.50
Costs and fees	-$203.07	-$3,763.23	-$3,966.30
Deposit with Court	$800.06	$14,797.14	$15,597.20
Interest accrued	$18.32	$338.50	$356.82
Total on hand	$818.38	$15,135.64	$15954.02

CONCLUSIONS OF LAW

The debt in this case is Debtor's separate debt. N.M. Stat. Ann. § 40-3-9(A)(1) (A debt incurred before marriage is a separate debt.)

[3]Gifts are excluded from taxable income. 26 U.S.C. § 102(a); Commissioner v. Duberstein, 363 U.S. 278, 284 (1960). This explains why Debtor and his wife did not reference the gift on their income tax returns.

In New Mexico a judgment creditor acting under a writ of garnishment can only seize the property that belongs to the judgment debtor. Jemko, Inc. v. Liaghat, 106 N.M. 50, 51, 738 P.2d 922, 924 (1987). See generally Annotation, Joint Bank Account as Subject to Attachment, Garnishment, or Execution by Creditor of One Joint Depositor, 86 A.L.R. 5th 527 (2001).

Debtor admits that Account 80326062 was his. See Finding of Fact 10. Therefore, $818.38 of the funds on deposit should be paid to Cadle. The sole remaining issue is how much of account 80328898 belongs to the Debtor.

N.M. Stat. Ann. § 45-6-211, titled "Ownership during lifetime" deals with multiple-person accounts:

> A. As used in this section, "net contribution" of a party means the sum of all deposits to an account made by or for the party, less all payments from the account made to or for the party which have not been paid to or applied to the use of another party and a proportionate share of any charges deducted from the account, plus a proportionate share of any interest or dividends earned, whether or not included in the current balance. The term includes deposit life insurance proceeds added to the account by reason of death of the party whose net contribution is in question.
> B. During the lifetime of all parties, an account belongs to the parties in proportion to the net contribution of each to the sums on deposit, unless there is clear and convincing evidence of a different intent. As between parties married to each other, in the absence of proof otherwise, the net contribution of each is presumed to be an equal amount.

Therefore, Debtor and Luanne are presumed to have made net contributions in equal amounts. However, this presumption is

rebuttable by "proof otherwise.[4]" The Court finds that Debtor and Luanne have met their burden of proving otherwise.

The funds in account 80328898 were a gift to Luanne. Gifts received during marriage are defined as separate property. See N.M. Stat. Ann. 40-3-8(A)(4). The funds remained her separate property unless she in turn gifted some or all of them to Debtor, or somehow transmuted them into community property.

"Generally, the mere opening of a joint account is not sufficient to establish a gift or trust." LeClert v. LeClert, 80 N.M. 235, 237, 453 P.2d 755, 757 (1969), overruled on other grounds by Hughes v. Hughes, 96 N.M. 719, 721-22, 634 P.2d 1271, 1273-74 (1981). (Citation omitted.) There is no other evidence that Luanne intended to make a gift. To the contrary, Debtor testified that his name was put on the account only as a planning device in the event of Luanne's death. If anything, this shows the intent to make a future gift, which is "abortive and unenforceable." Kinney v. Ewing, 83 N.M. 365, 370, 492 P.2d 636, 641 (1972). (Citation omitted.) See also Johnston v. Sunwest Bank of Grant County, 116 N.M. 422, 425, 863 P.2d 1043, 1046 (1993) (Plaintiff was not an owner of joint account because she

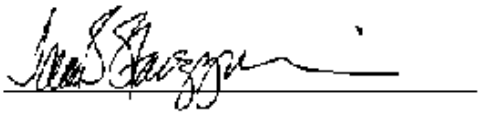
[4]The majority view is that any presumptions about ownership of joint accounts is rebuttable and the burden of proof is on the joint owners, not the creditor. Baker v. Baker, 710 P.2d 129, 134-35 (Okla. Ct. App. 1985).

contributed nothing to it and the joint owner had no intent to make a gift.)

Similarly, transferring separate property into joint tenancy does not automatically transmute it to community property. Hughes v. Hughes, 96 N.M. at 725, 634 P.2d at 1277 (1981). And, there is no other evidence in the record that indicates Luanne was attempting to transmute the funds.

In summary, the Court finds that Luanne did not give the funds in account 80328898 to Debtor, nor did she transmute them. The funds remained her separate property. "Neither spouse's interest in community property or separate property shall be liable for the separate debt of the other spouse." N.M. Stat. Ann. 40-3-10(A). Therefore, the $15,135.64 of funds from account 80328898 should be returned to Luanne.

The Court will enter a separate Order reflecting the above.



Honorable James S. Starzynski
United States Bankruptcy Judge

Date Entered on Docket: April 16, 2008

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