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Hon. Samuel J. Steiner
Chapter 7

4
5 UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

6 In re:) NO. 02-11255
7 ,)
8 Debtors.)
9 _____)
DEBTORS' MEMORANDUM OF
LAW RE TURNOVER MOTION

10 FACTS

- 11 1. The debtor was employed as a real estate sales person by Windermere Real Estate,
12 Inc.
- 13 2. At no time was he ever a real estate broker or the designated broker at
14 Windermere Real Estate.
- 15 3. As a real estate sales person, his employment was with Windermere and his rights
16 compensation are a function of his employment contract with Windermere.
- 17 4. Pursuant to the contract with Windermere, he was not entitled to receive any
18 commission until such time as Windermere was paid. He was only entitled to receive
19 commissions net of the amounts owed to Windermere and owed pursuant to the agreements to
20 other persons, i.e. listing agents.
- 21 5. For each transaction that the trustee claims payment, the transaction did not close
22 until after filing and the debtor was required to perform substantial service, post petition in order
23 to be paid. The funds from the post petition closings were not paid to Windermere until after the
24 filing of the original petition herein.
- 25 6. For each transaction it was necessary for the debtor to remain licensed in order to
26 be compensated.
- 27 7. After all of Windermere's deductions, the net amount received by the debtor was
28 only \$7830.88.

1 it is not paid. Conversely, the broker has liability in the event that there is a breach of duty.

2 After all, legally, the relationship is with the broker, not the salesperson.

3 The salesperson, on the other hand is employed by the broker. The manner of
4 compensation is set forth in the contract of employment between the salesperson and the broker.
5 The salesperson could be paid hourly, on commission, or on some other lawful basis agreed to by
6 the parties. Compensation is determined by the agreement. In this case, Windermere, the
7 employing broker has a contract with its salespersons that provides

8 5. COMMISSION AGREEMENT. Windermere Commission
9 Schedule A Is attached hereto and incorporated in this agreement
by reference and summarizes commission shares and conditions.

10 Schedule A, Paragraph 1 states specifically:

11 C. All commissions must be paid to Broker alone per State law
12 **Associate shall have no claim to commission shares except from
money actually received by Broker.** [emphasis supplied]

13 Clearly, until Windermere received the funds, the debtor had no claim to them. Counsel
14 for the trustee has filed a memorandum in this case citing bankruptcy cases from California
15 regarding the right of the trustee to commissions on sales that were written pre-petition but that
16 closed post-petition. However, that case involved California law and involved a “**Broker.**”
17 California law is substantially different from Washington Law and clearly, under Washington
18 law, while the Broker might have a right to the commission, that right does not inure to the real
19 estate Salesperson. The right of the broker to a commission is not an issue before the court. The
20 debtor agrees that the broker may have had such a right. Unfortunately for the trustee, the debtor
21 is not the broker, he is a salesman and his rights are set forth in the contract.

22 The relationship between the Broker and Salesperson is governed by the contract of
23 employment. Pursuant to § 541, the trustee derives his rights from the debtor and does not have
24 any rights greater than the debtor has. In this case, the debtor, pursuant to his contract of
25 employment, had no right to any commission until cash was received by Windermere, the broker.
26 On the date of filing the debtor had, at best, an expectancy. An expectancy is not property and is
27 not an asset to which the trustee succeeds.

28

1 The law in this Circuit is that a mere expectancy is not property of the estate. *See, In re*
2 *Schlitz* 270 F.3d 1254 (9th Cir. 2001). The court cited with approval *In re Vote* 261 B.R. 439 (8th
3 Cir. BAP. 2001). where the court decided the whether post-petition disaster assistance that
4 resulted from a pre-petition act became property of the estate and held that the rights arising out
5 of adoption of fishing quotas, post petition, were not property of the estate.

6 Such an expectancy (or “hope,” if you will) does not rise to the
7 level of a “legal or equitable interest” in property such that it might
8 be considered property of the estate under 11 U.S.C. § 541(a)(1).

8 In this case, the debtor had an expectancy. If he was still licensed as a real estate
9 salesman, was still employed at Windermere and Windermere actually received the commission,
10 he would be paid. If all of these factors were not present, there was no requirement that he paid
11 and, in fact, it might have been unlawful to pay him if some of these conditions were not present.

12 The testimony will also show that the debtor needed to remain employed as a real estate
13 sales person in order to share in the commission. If he was not so licensed, he would not receive
14 a commission. If he left the employment of Windermere, he might be entitled to receive some
15 portion of the commission but the broker would assign a replacement agent and would, if the
16 salesperson remained licensed, provide an arbitrary portion of the commission to him. However,
17 this was not assured, it was just a customary practice.

18 This was clearly personal services contract that the trustee could not, and certainly did not
19 assume. As such he is not entitled to any compensation. Post petition compensation is owned by
20 the debtor and the estate does not have an interest in it.

21 The trustee claims compensation was do to the debtor well beyond anything to which the
22 contract provided.

23 The commission split is set forth in the Employment agreement discussed *supra*. It
24 provides that after the Broker receives the commission, it is split with the Real Estate Sales
25 Person according to the agreement, after deduction of the Broker’s portion and any portion due to
26 another Salesperson in the Office.

27 The testimony of _____ and _____ will show that from the total
28 commission provided for in the Earnest Money Receipt and Agreement, his portion, after

1 deduction of the Broker's portion, the other agent's portion and costs was substantially less than
2 any amount claimed by the trustee herein. It was only \$7830.88.

3 From the total commission received by Windermere, there were deductions for the listing
4 agent (The debtor was the selling agent and did not have a listing.), broker's fees, advertising,
5 and the like. The testimony will show that there were other substantial deductions by
6 Windermere that were owed to it pursuant to the contract prior to any entitlement by the debtor.

7 The trustee, by failing to set a hearing waived any valid claim of objection to exemptions.

8 The Trustee filed a vacuous objection to exemptions that did not set forth any real basis
9 for the objection. Doing so was a denial of due process because the debtor was not apprised of
10 the basis for the objection. *In re Shuman*, 78 B.R. 254, 256 (9th Cir. BAP 1987). The trustee
11 compounded the problem by not setting it for hearing. The trustee has still not set his objection
12 to exemptions on for hearing. Judge Kurtz in *In re Bush* 346 B.R. 523, 527 (Bkrtcy.E.D. Wash.,
13 2006) dealing with the requirement that the objection be filed and mailed within 30 days
14 explained the policy as supporting "the well-established principle that bankruptcy proceedings in
15 general and Rule 4003(b) in particular are designed to efficiently settle bankrupt estates." *Stoulig*
16 *v. Traina*, 169 B.R. 597, 601 (E.D.La.1994), *aff'd*, 45 F.3d 957 (5th Cir.1995). In this case 5
17 years have passed and the trustee has still not noted the matter for hearing. This is not the quick
18 and efficient settlement of bankruptcy estates envisioned by the drafters.

19 CONCLUSION

20 The "property of the estate" that the debtor seeks is the post petition wages of the debtor.
21 He mistakes California Law concerning real property brokers with Washington Law concerning
22 the rights of real estate salesmen. Salesmen are employees and their right to compensation
23 derives from their contract of employment with their broker. In this case the debtor was not
24 entitled to any compensation until his broker received funds. Whether the broker may have had a
25 right is not relevant to this case. The debtor was not a broker.

26 The amount that the debtor received is vastly less than the trustee claims. He only
27 received a net check. From the total commission Windermere took its portion, paid expenses,
28 and paid the split due to the listing agent.

