UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

In re:

WILLIAM ARTHUR THOMAS, III,
Debtor.

CASE NO.: 09-41174-LMK
CHAPTER: 7

_____/

THERESA M. BENDER, CHAPTER 7 TRUSTEE

Plaintiff,

v.

ADV. PRO. NO.: 10-04018-LMK

WILLLIAM ARTHUR THOMAS, III,

Defendant.
_____/

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER came before the Court for hearing on February 14, 2012 on the Motions for Summary Judgment filed by both the Plaintiff, Theresa M. Bender, the Chapter 7 trustee and the Debtor-Defendant, William Arthur Thomas, III ("Debtor"). The Trustee asserts that the profit of $30,839.13 from the Debtor's real estate venture constitutes "proceeds" from property of estate and is therefore part of the estate pursuant to 11 U.S.C. § 541(a)(6). The Defendant argues the profit is not part of the estate because of its connection to the Debtor's postpetition activity. I find that the profit of $30,839.13 constitutes property of the estate for the reasons explained more fully herein, and accordingly the Plaintiff's Motion for Summary Judgment is granted and the Defendant's motion is denied. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(E).

BACKGROUND

On December 18, 2009, the Debtor, a real estate investor, filed for relief under Chapter 7. Prior to filing, a portion of the Debtor's real estate ventures included "flipping" distressed prop-

erties. This adversary proceeding centers around the resulting profit the Debtor received from a certain property flip. In general, the Debtor and his business partners would enter into an option contract with an owner of distressed property to purchase the property contingent upon the approval by the owner's lender of a short sale and the procurement of a third party purchaser. After fulfillment of the two contingencies, the Debtor would exercise his rights pursuant to the initial option contract, and close on the sale with the original owner. The Debtor would then resell the property to the third party purchaser, presumably for a profit.

This proceeding involves the flipping of a specific property originally owned by Craig Mobley ("Mobley") undertaken by the Debtor and his business partners, Paul Elya and Ed Garcia. On September 24, 2009, the Debtor entered into a Notice of Contract for Sale and Purchase (the "option contract") with Mobley for a purchase price of $130,000.00. This option contract gave the Debtor the right to purchase real property from Mobley contingent upon an approval of the short sale by Mobley's lender and the finding of a third party purchaser.

After receiving the option contract, the Debtor collected financial information from Mobley and turned it over to negotiators whose job was to obtain approval of the short sale by Mobley's lender. The only two negotiators involved in this case were Elya and Garcia.
On February 20, 2010, the Debtor entered into a contract to resell the real property to Greg May and Amelia Rosseter ("May and Rosseter") for $179,000.00. On March 1, 2010, May and Rosseter deposited $2,000.00 for the purchase of the property from the Debtor. On March 16, 2010, a closing was held in which the Debtor purchased the property from Mobley for $130,000.00. On April 12, 2010, the sale between the Debtor and May and Rosseter was closed, resulting in a profit of $30,839.13 for the Debtor and his partners. After the sale with May and Rosseter was closed, the Debtor paid $16,664.02 to Garcia and $5,489.65 to Elya.

On December 23, 2010, the Trustee initiated this adversary proceeding, arguing that pursuant to Section 541(a)(6), the profit of $30,839.13 is property of the estate because it is "proceeds" of the option contract, which was initially property of the estate. The Debtor's defense is based on that portion of Section 541(a)(6) which excludes from the estate any "earnings from services performed by an individual debtor after the commencement of the case." The Debtor contends that the exclusion provided by Section 541(a)(6) applies to the profit because it stems entirely from a postpetition contract and the Debtor's postpetition efforts.

DISCUSSION

Summary judgment is appropriate if the pleadings, depositions, and affidavits show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed R. Bankr. P. 7056, incorporating Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Both parties have stipulated that the material facts and applicable law are not in dispute. The question presented is whether the profit received by the Debtor is property of the estate that may be administered by the Trustee.

Section 541(a)(1) of the Bankruptcy code defines "property of the estate" to encompass "all legal or equitable interest of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). Section 541(a)(1) is generous and "sweeps into the bankruptcy estate all interest held by the debtor-even future, non-possessory, contingent, speculative, and derivative interest." *In re Carlton*, 309 B.R. 67, 71 (Bankr. S.D. Fla. 2004). In this case it is clear that the option contract is property of the estate pursuant to Section 541(a)(1) given that upon filing for relief under Chapter 7, the Debtor had already entered into the option contract. Thus, the option contract was a legal interest of the Debtor.

The crux of this case is whether the profit is excluded from property of the estate as income earned postpetition or whether it was earned based on the Debtor's prepetition activities.

For the reasons that follow, I find that the profit is property of the estate because the profit is proceeds of the option contract which was obtained prepetition and included as part of the Debtor's bankruptcy estate.

Section 541(a)(6) broadens the scope of the property of the estate to include the "[p]roceeds, product, offspring, rents or profits of or from property of the estate after the commencement of the case" but excepts "earnings from services performed by an individual debtor after the commencement of the case." 11 U.S.C. § 541(a)(6). Congress intended the scope of the "proceeds, product, offspring, rents, or profits" clause in Section 541(a)(6) to encompass "any conversion in the form of property of the estate, and anything of value generated by property of the estate." *In re Hanley,* 305 B.R. 84, 86-87 (Bankr. M.D. Fla. 2003) (quoting S. Rep. No. 95-989, at 82 (1978); H. R. Rep. No. 95-595, at 368 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5787).

The Debtor argues that the profit is not property of the estate because it does not fall within the "proceeds, product, offspring, rents, or profits" clause of Section 541(a)(6). More specifically, the Debtor contends that a postpetition contract was the sole reason for the receipt of a profit, and consequently the "proceeds" clause fails to apply. The Debtor proposes to take a bifurcated view of the property venture, labeling the option contract with Mobley as the "A to B" contract and the contract to sell the property to May and Rosseter as the "B to C" contract. The Debtor finds it dispositive that it was the postpetition "B to C" contract that directly led to the realization of the property resale and actual payment. In support of his argument, the Debtor cites to *In re Schneider,* 864 F.2d. 683 (10th Cir. 1988), in which the court ruled that government agricultural support payments, made in reference to prepetition crop years, were not property of the estate because the contract obliging the government to make such payments was made after the petition was filed.

Taking a narrow view of the facts of the instant case, the Debtor argues that *Schneider* is pertinent to the case at bar. The similarity between the instant case and *Schneider* is that in both cases the postpetition payments were made pursuant to a postpetition contract, however, *Schneider* proves to be inapplicable to the instant case. The Debtor ignores the critical fact that in *Schneider* the postpetition payments stemmed purely from a postpetition contract and had no ties whatsoever to any enforceable prepetition contract or agreement. Conversely, in this case the profit received was related to a prepetition contract. It was actually the prepetition contract that empowered the Debtor to purchase the property and ultimately receive payment for the resale of the same property. Given the significant factual difference between this case and *Schneider,* I do not find the postpetition nature of the "B to C" contract as dispositive.

Furthermore, it is evident that the Debtor embarked in the purchase and sale of the real property in hopes of making a profit. This venture, however, entails many moving parts, essential to profitability. Taking a bifurcated view of the property venture and focusing purely on a single part of the venture and its direct results, as proposed by the Debtor, ignores the economic reality of the "flipping" scheme. Instead, it is more appropriate to take into account the actions involved in the venture as a whole.

In analyzing each part of the venture in relation to the overall undertaking at hand, it is apparent that the Debtor would have never received a profit without the option contract between himself and Mobley. In this case, it is clear that the option contract was property of the estate; and considering that it was the option contract that allowed the Debtor to purchase the real property that was eventually resold, the resulting profit from the resale of the real property can be seen as the value generated. Therefore, the profit received by the Debtor fits well within the "proceeds, product, offspring rents or profits" clause in Section 541(a)(6).

The Debtor further attempts to exclude the profit from the estate by arguing that the profit falls within the limitation of Section 541(a)(6), which excludes from the estate any "earnings from services performed by an individual debtor after the commencement of the case." 11 U.S.C. § 541(a)(6). In elaboration of the Section 541(a)(6) limitation, the Debtor contends that "[w]hen significant or even minor efforts are required after the bankruptcy is filed in order to produce a property after the case is filed[,] the resulting property is not property of the estate, even when that property has a tenuous beginning in the prepetition past." This argument, presented by Debtor's counsel, is purportedly derived by the ruling of *In re Doemling,* 127 B.R. 954 (W.D Pa. 1991).

According to Debtor's counsel's version of *Doemling*, the court ruled that proceeds from a postpetition automobile accident were not property of the estate despite the fact that the automobile, owned by the debtors, was initially part of the estate. However, in actuality and in direct contradiction to counsel's description, the debtors in *Doemling* were neither the drivers nor owners of the automobile involved in the accident. In fact, the debtors were pedestrians injured by an automobile owned by another party. Moreover, the proceeds that were ultimately excluded from the estate by the *Doemling* court were proceeds from a postpetition personal injury suit brought on by the debtors against the driver of the automobile. Simply stated, *Doemling* fails to advance the Debtor's argument. In *Doemling* the automobile accident did not occur until five months after the petition was filed, making it clear that the prepetition past of the exempted personal injury proceeds is nonexistent and doesn't even reach the status of "tenuous." Thus, the actual proposition of *Doemling* lacks any meaningful applicability to the issue at hand.

Property is included in the estate if it is "sufficiently rooted in the pre-bankruptcy past and so little entangled with the bankrupts' ability to make an unencumbered fresh start." *Segal v Rochelle,* 382 U.S. 375, 380, 86 S. Ct. 511, 515, 15 L. Ed. 2d 428 (1966) Moreover, the postpeti-

tion earnings of a debtor's venture that is not attributable to the debtor's postpetition personal services are included as property of the estate. *In re Fitzsimmons,* 725 F.2d 1208 (9th Cir. 1984); *In re Moyer,* 421 B.R. 587, 594 (Bankr. S.D. Ga. 2007). In other words, any portion of the profit that is accredited to the postpetition personal services of the Debtor will be excluded from the estate. *Id.*

The Debtor did not engage in any postpetition personal services in his attempt to profit from the property venture. In this case, three main steps were necessary in order to make the flipping of the real property profitable: (1) an option contract to purchase the real property is signed between the Debtor and Mobley; (2) a short sale is approved by Mobley's lender; and (3) a third party purchaser is found. The record shows that the entirety of the Debtor's personal involvement in the venture occurred prepetition and consisted primarily in working with Mobley to obtain the original option contract. After the Debtor's bankruptcy filing, individuals other than the Debtor fulfilled the remaining work of negotiating with the bank and finding a third party purchaser. For instance, Elya and Garcia had the task of negotiating with the bank to approve the short sale. The property was listed for sale with a real estate broker, whose listing produced the second purchasers. The Debtor displayed an insignificant amount of involvement, if any, in the bank negotiations. In fact, in his deposition, the Debtor stated, "I don't do the negotiations." The Debtor's own statements lead to the conclusion that the amount of postpetition personal services exhibited by the Debtor was inconsequential to the ultimate profit.

Further arguing that the profit received is not part of the estate, the Debtor analogizes this case to an employee bonus case where the court held that a postpetition bonus awarded to the debtor was not property of the estate. *See Sharp v. Dery*, 253 B.R. 204 (E.D. Mich. 2000). However, in *Sharp*, the bonuses were not part of the estate because they were dependent on the debt-

or's postpetition service. Conversely, in the instant case, the profit derived was in connection to the Debtor's prepetition past, more specifically, the acquiring of the option contract.

In light of the absence of material postpetition personal services exhibited by the Debtor, he proposes to judge his actions in the abstract. He argues that his role as the "spoke in the wheel" satisfies the requirement of postpetition personal service, foreclosing the entire portion of the profit from inclusion into the estate. Though the Debtor could be labeled as the "spoke in the wheel," the similar facts of *Fitzsimmons* thwarts the Debtor's argument. In *Fitzsimmons,* the debtor was the sole proprietor of a law firm that employed other attorneys. *Fitzsimmons,* 725 F.2d at 1209. Following the debtor's filing, the debtor's law firm continued to generate earnings. *Id.* Similar to the debtor in *Fitzsimmons,* the Debtor in this case delegated responsibilities to the other participants in his venture. In both cases, the debtors were the heads of the overall business endeavors and each could be referred to as the "spoke in the wheel." This, however, proved to be of little importance to the *Fitzsimons* court. The *Fitzsimmons* court held that Section 541(a)(6) excludes from the estate only those earnings generated by services personally performed by the individual debtor. *Id* at 1211. The *Fitzsimmons* court reasoned that that plain reading of Section 541(a)(6) provides a narrow exception for only earnings derived from the debtor's postpetition personal services *Id.*

The *Fitzsimmons* court reiterated the significance of actual personal efforts by the debtor when noting that the services of the debtor's employees "are not services of the individual debtor himself." *Id*. The same can be said for the Debtor in this case. Hence, the services of Elya, Garcia, or other parties involved in the flipping of the property are not the services of the Debtor himself. As a result, I find that the Debtor's role as the "spoke in the wheel" stops short of amounting to the Debtor's personal services and therefore fails to invoke the limitation provided by Section 541(a)(6).

CONCLUSION

In sum, I find that the profit received by the Debtor is sufficiently rooted in his pre-bankruptcy past because the personal services of the Debtor, attributable to the receipt of profit, transpired exclusively in his prepetition past. Furthermore, the personal service limitation provided by Section 541(a)(6) does not exclude the profit from the estate due to the apparent absence of postpetition services by the Debtor. For these reasons, I find that the profit is property of the Debtor's bankruptcy estate. Accordingly, it is hereby

ORDERED and ADJUDGED that the Plaintiff's Motion for Summary Judgment (Doc. 66) is GRANTED and the Defendant's Motion for Summary Judgment (Doc. 57) is DENIED.

DONE and ORDERED in Tallahassee, Florida this 13th day of March, 2012.

LEWIS M. KILLIAN, JR.
United States Bankruptcy Judge

cc: all parties in interest

I HEREBY CERTIFY that this is a true and correct copy of the original on file in the office of the Clerk, United States Bankruptcy Court for the Northern District of Florida.

WILLIAM W. BLEVINS, Clerk, Bankruptcy Court

By Carolyn Romine
Deputy Clerk