

2007

Janerae F. Smith v. R. Kimball Mosier : Brief of Appellee

Utah Court of Appeals

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R. Kimball Mosier; Parsons, Kinghorn, Harris; Counsel for Appellee.

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IN THE SUPREME COURT OF THE STATE OF UTAH

In re:

JANERAE F. SMITH,

Debtor.

JANERAE F. SMITH,

Appellant,

v.

R. KIMBALL MOSIER, Trustee,

Appellee.

Case No. 20070892-SC

Bankruptcy No. 06-24973
(Chapter 7)

BRIEF OF APPELLEE

On Certification of Question of State Law
From the Bankruptcy Appellate Panel of the Tenth Circuit

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FILED
UTAH APPELLATE COURTS
APR - 4 2008

In re:	:	
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JANERAE F. SMITH,	:	
	:	
Debtor.	:	
	:	Case No. 20070892-SC
	:	
JANERAE F. SMITH,	:	Bankruptcy No. 06-24973
	:	(Chapter 7)
Appellant,	:	
	:	
v.	:	
	:	
R. KIMBALL MOSIER, Trustee,	:	
	:	
Appellee.	:	

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From the Bankruptcy Appellate Panel of the Tenth Circuit**

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TABLE OF CONTENTS

STATEMENT OF THE BASIS OF APPELLATE JURISDICTION	1
STATEMENT OF THE ISSUES PRESENTED AND APPLICABLE STANDARD OF REVIEW	1
STATEMENT OF THE CASE	1-2
STATEMENT OF ADDITIONAL UNDISPUTED FACTS	2
SUMMARY OF ARGUMENT	2-3
ARGUMENT	
I. THE MONIES WITHHELD FROM APPELLANT’S SOCIAL SECURITY AND PENSION FUND DISBURSEMENTS, WHICH WERE PAID TO THE IRS AND ULTIMATELY PLACED IN THE FEDERAL TREASURY, ARE NOT TRACEABLE UNDER ANY REASONABLE THEORY	3
A. <u>Funds Held in the Federal Treasury Are Not Held in an Identifiable Account.</u>	5
B. <u>Withheld Income Is Not Held for the Benefit of Individual Tax Payers.</u>	6
C. <u>Withheld Income Paid to the Federal Treasury Cannot Be Traced to an Individual Taxpayer.</u>	7
II. APPELLANT HAS FAILED TO APPLY ANY THEORY OF TRACING TO ESTABLISH THAT THE MONIES AT ISSUE ARE TRACEABLE	9
CONCLUSION	10

TABLE OF AUTHORITIES

CASES

<i>Branch v. United States</i> , 100 U.S. 673 (1879)	5
<i>In re Annis</i> , 229 B.R. 802 (10 th Cir. BAP 1999)	8
<i>In re Carbaugh</i> , 278 B.R. 512 (10 th Cir. BAP 2002)	8
<i>In re Dickerson</i> , 227 B.R. 742 (10 th Cir. BAP 1998)	8
<i>McCullough v. Young</i> , 947 F.2d 953, (10 th Cir. 1991)	5, 9

STATUTES

31 U.S.C. § 301(b) (2003)	5
31 U.S.C. § 302 (2003)	5
31 U.S.C. § 3301(a)(1)(2003)	5
31 U.S.C. § 3302 (a)(3)(2003)	5
31 U.S.C. § 3302(b) (2003)	6
UTAH CODE ANN. § 78-23-5-(1)(a)(iii), (iv), (v), (vi), (vii), (xiii), (xiv)	2, 4, 9
UTAH CODE ANN. §§ 78-23-9, 78-23-9(2), 78-23-9(3)	2, 3, 4, 6, 7, 8, 9, 10

RULES

FED. R. BANKR. P. 8001	1
FED. R. BANKR. P. 8002	1

STATEMENT OF THE BASIS OF APPELLATE JURISDICTION

This Court has jurisdiction of this appeal pursuant to United States Bankruptcy Appellate Panel (BAP) for the Tenth Circuit's Certification of Question of State Law and this Court's Order of Acceptance dated December 17, 2007.

STATEMENT OF THE ISSUES PRESENTED AND APPLICABLE STANDARD OF REVIEW

The issue presented in this appeal as stated in the BAP's Certification is whether "exempt funds retain their exempt character under Utah law after being paid as taxes to the federal government." Appellee believes this incorrectly states the issue presented in the appeal. Appellee believes **the issue in this appeal is whether Appellant complied with the applicable Utah law.**

To the extent the issues in this appeal are questions of law, a "*de novo* standard" or review is appropriate.

STATEMENT OF THE CASE

This case involves a claimed exemption in monies withheld from Appellant's social security and pension fund income, which were paid to the Internal Revenue Service ("IRS") and ultimately placed in the Treasury of the United States ("Federal Treasury"). R. Kimball Mosier ("Trustee" and "Appellee") filed an Objection to Debtor's Claimed Exemption on April 3, 2007. On May 2, 2007, Appellant filed her Response to Trustee's

Objection to Debtor's Claimed Exemption. A hearing on Trustee's Objection to Debtor's Claimed Exemption was held on May 8, 2007. The United States Bankruptcy Court for the District of Utah entered its Order Disallowing Debtor's Claimed Exemption in Tax Refunds on May 15, 2007. The order provided "that the exemption, claimed by the Debtor, pursuant to UTAH CODE ANN. § 78-23-5-(1)(a)(xiv), in the tax refunds, is hereby disallowed in its entirety."

STATEMENT OF ADDITIONAL UNDISPUTED FACTS

In addition to the facts stated by Appellant, it is undisputed that at the hearing on Trustee's Objection to Debtor's Claimed Exemption held on May 8, 2007, Appellant failed to provide the court with any evidence or apply any theory of tracing to demonstrate that the monies withheld from the Appellant's social security and pension fund disbursements, which were paid to the IRS and ultimately placed in the Federal Treasury, were traceable.

SUMMARY OF ARGUMENT

Appellee does not believe there is a question of Utah state law at issue before this Court. The issue in Appellant's appeal is a factual question.

Appellee does not dispute that under Utah Code Ann § 78-23-9, Appellant's social security and pension fund income is exempt in any other form into which they are

traceable. Appellee contends that (1) the funds at issue are not traceable and (2) that Appellant failed to trace the funds at issue. The critical provision of the exemption statute that Appellant has neglected to address is Utah Code Ann. § 78-23-9(3). The relevant portion of § 78-23-9(3) provides that property exempt under 78-23-9 is “traceable under this section by **application** of” a reasonable basis for tracing (emphasis added). The monies withheld from Appellant’s social security and pension fund disbursements, which were paid to the IRS and ultimately placed in the Federal Treasury, are not traceable under any theory, including the methods set forth in UTAH CODE ANN. § 78-23-9(3), and further, Appellant has failed to apply any tracing theory to the monies at issue. Appellant simply failed to comply with the provisions of Utah Code Ann § 78-23-9(3) and, therefore, the funds are not traceable under § 78-23-9.

This Court should rule that monies refunded to a taxpayer as an overpayment of taxes are exempt if the overpayment is traceable to exempt property “by application of: (a) the principle of: (i) first in first out; or (ii) last in last out: or (b) any other reasonable basis for tracing selected by” the taxpayer.

ARGUMENT

I. THE MONIES WITHHELD FROM APPELLANT’S SOCIAL SECURITY AND PENSION FUND DISBURSEMENTS, WHICH WERE PAID TO THE IRS AND ULTIMATELY PLACED IN THE FEDERAL TREASURY, ARE NOT TRACEABLE UNDER ANY REASONABLE THEORY.

In order for Appellant’s tax refund to be exempt, the tax refund must be

traceable to exempt property. Appellant failed to present any evidence that the monies withheld and paid to the IRS and ultimately placed in the Federal Treasury were held in an identifiable account for her benefit. Appellant also failed to articulate any reasonable basis for tracing or present any evidence that the monies withheld and paid to the IRS can be traced to her tax refund. Nevertheless, Appellant now requests that this Court find that her tax refunds should be exempt. The United States Bankruptcy Court for the District of Utah correctly concluded that the Appellant's claimed exemption in her tax refund must be disallowed. Based on Appellant's failure to produce any evidence or apply any theory of tracing, the Bankruptcy Court could not find the monies were exempt.

Pursuant to UTAH CODE ANN. § 78-23-9, “[m]oney or other property exempt under Subsection 78-23-5(1)(a)(iii), (iv), (v), (vi), (vii), (xiii), or (xiv) remains exempt after its receipt by, and while it is in the possession of, the individual or in any other form into which it is traceable.” UTAH CODE ANN. § 78-23-9(2) (*emphasis added*). “Money or other property and proceeds exempt under this chapter are traceable under this section by *application* of: (a) the principle of: (i) first-in first-out; or (ii) last-in or last-out; or (b) any other reasonable basis for tracing selected by the individual.” UTAH CODE ANN. § 78-23-9(3). In the instant matter, the monies that were withheld from the Appellant's social security and pension fund disbursements and paid to the IRS are not traceable under UTAH CODE ANN. § 78-23-9(3).

In order to apply any theory of tracing to money, there must first be an identifiable

res. *See, McCullough v. Young*, 947 F.2d 953 (10th Cir. 1991). Additionally, the individual seeking to trace the money must have some interest in the res. The interest may be an ownership interest or a beneficial interest under some theory of law such as constructive trust. If the money has been co-mingled with other monies, the individual claiming the funds must be able to establish, by presenting competent evidence, that the monies she or he claims can be traced using some applicable theory of tracing.

A. Funds Held in the Federal Treasury Are Not Held in an Identifiable Account.

“The United States Government has a Treasury of the United States.” 31 U.S.C. § 302 (2003). The Federal Treasury holds all of the assets of the United States. These assets include monies paid to the United States and other assets such as gold, silver, bullion, notes, currency, and other personal property. *See Branch v. United States*, 100 U.S. 673 (1879). Therefore, the Federal Treasury is not an identifiable account; rather, it is the repository of all the assets of the United States.

Additionally, “[t]he head of the Department [of the Treasury] is the Secretary of the Treasury.” 31 U.S.C. § 301(b) (2003). One of the general duties of the Secretary of the Treasury is to receive and keep public money. *See* 31 U.S.C. § 3301(a)(1) (2003). However, “an official or agent of the United States Government having custody or possession of public money shall keep the money safe without . . . depositing the money in a bank.” 31 U.S.C. § 3302(a)(3) (2003). Instead, “an official or agent of the Government

receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.” 31 U.S.C. § 3302(b) (2003). Consequently, the Federal Treasury is not an identifiable account; rather, it is the repository of all the assets of the United States. As a result, the monies that were withheld from the Appellant’s social security and pension fund disbursements and paid to the IRS are not traceable under any method, including the methods set forth under UTAH CODE ANN. § 78-23-9(3).

B. Withheld Income Is Not Held for the Benefit of Individual Tax Payers.

Tax refunds paid to an individual taxpayer are paid from the Federal Treasury. Taxpayers have no ownership interest in the Federal Treasury. Funds held in the Federal Treasury are “public monies”. Withholdings from income are not held for the benefit of taxpayers. The term “refund” by definition indicates a change in ownership and control. The Federal Treasury may use public monies in the Federal Treasury as it deems appropriate without any requirement of accounting to an individual taxpayer. Additionally, payment of tax refunds is not an absolute legal obligation of the Federal Treasury. Congress has the ability to change the amount of taxes at any time. Accordingly, the monies that were withheld from the Appellant’s social security and pension fund disbursements and paid to the IRS were not held for the benefit of the Appellant. As a result, the monies that were withheld from the Appellant’s social security and pension fund disbursements and paid to the IRS are not traceable under any method,

including the methods set forth under UTAH CODE ANN. § 78-23-9(3). Title to the monies withheld from the Appellant's social security and pension fund disbursements passed to the government. There were no restrictions on the government pertaining to the use of the monies withheld from the Appellant's social security and pension fund disbursements, or, for that matter, monies withheld from any other individual's income. More importantly, in the event that an individual is entitled to a tax refund at the end of the year, the monies that constitute the tax refund are obtained from monies to which the government has title and which are not specifically identified for any purpose, individual, or entity. Therefore, the monies that were withheld from the Appellant's social security and pension fund disbursements are not traceable under any tracing principles, including the principles set forth in UTAH CODE ANN. § 78-23-9(3).

C. Withheld Income Paid to the Federal Treasury Cannot Be Traced to an Individual Taxpayer.

Income tax withholdings are initially paid to a bank authorized to receive the funds on behalf of the Federal Treasury. Tax refunds are paid from the Federal Treasury. Assuming the tax refund a taxpayer receives represents the income taxes originally withheld, the funds are so hopelessly co-mingled with the trillions of dollars that flow through the Federal Treasury that they cannot be traced. Consequently, the requirements of UTAH CODE ANN. § 78-23-9(3) are not satisfied by a conclusory statement that a payment received from the Federal Treasury is the same money that was paid to the Federal Treasury.

The monies withheld from Appellant's social security and pension fund disbursements are not held in trust or escrow for Appellant, are not held in a separate account or fund for Appellant, are not held for or designated as payable to Appellant, and are not in any way held for the benefit of Appellant. Rather, the monies that were withheld from Appellant's social security and pension fund disbursements were commingled with billions of other dollars paid to the Internal Revenue Service and trillions of dollars and other assets in the Federal Treasury. Therefore, the monies that were withheld from Appellant's social security and pension fund disbursements are no longer identifiable, and, as such, cannot be traced under any tracing principles, including the principles set forth in UTAH CODE ANN. § 78-23-9(3).

Appellant cannot establish any interest in an identifiable account, cannot establish that the monies withheld from her social security and pension fund disbursements were held for her benefit, and cannot establish that the monies withheld from her social security and pension fund disbursements are traceable. The United States Bankruptcy Court for the District of Utah correctly concluded Appellant's tax refund is not exempt. *See In re Carbaugh*, 278 B.R. 512 (10th Cir. BAP 2002); *In re Annis*, 229 B.R. 802 (10th Cir. BAP 1999); and *In re Dickerson*, 227 B.R. 742 (10th Cir. BAP 1998). Therefore, this Court should affirm the Order Disallowing Debtor's Claimed Exemption in Tax Refunds entered by the United States Bankruptcy Court for the District of Utah.

II. APPELLANT HAS FAILED TO APPLY ANY THEORY OF TRACING TO ESTABLISH THAT THE MONIES AT ISSUE ARE TRACEABLE.

Appellant asserts that, pursuant to UTAH CODE ANN. § 78-23-9, money from an otherwise exempt pension fund remains exempt in any other form into which it is traceable. While Appellee does not dispute the provisions of Section 78-23-9, Appellee emphasizes that the money must be traceable in order for it to retain its exempt status. *See* UTAH CODE ANN. § 78-23-9. Therefore, because Appellant has failed to trace the monies withheld from her social security and pension fund disbursements, a burden that the Appellant must satisfy in order for her claimed exemption to be allowed, this Court should affirm the Order Disallowing Debtor's Claimed Exemption in Tax Refunds entered by the United States Bankruptcy Court for the District of Utah.

Appellant has the burden to trace the monies withheld from Appellant's social security and pension fund disbursements, which were paid to the IRS and ultimately placed in the Federal Treasury. *See McCullough v. Young*, supra at 953, (explaining that "the burden to trace the funds to an identifiable res is, in the first instance, on the party seeking to impress the property with a constructive trust, in this case, the Appellant."). Similarly, pursuant to UTAH CODE ANN. § 78-23-9, the statute which Appellant relies on, "[m]oney or other property exempt under Subsection 78-23-5(1)(a)(iii), (iv), (v), (vi), (vii), (xiii), or (xiv) remains exempt after its receipt by, and while it is in the possession of the individual or in any other form into which it is traceable." UTAH CODE ANN. § 78-23-9(2) (*emphasis added*).

In the instant matter, despite Appellant's burden to trace the monies withheld from her social security and pension fund disbursements, Appellant has failed to present any evidence that the monies withheld from her social security and pension fund disbursements are traceable. In particular, Appellant, at the hearing on Trustee's Objection to Debtor's Claimed Exemption held on May 8, 2007, failed to provide the court with any evidence that the monies withheld from her social security and pension fund disbursements, which were paid to the IRS and ultimately deposited in the Federal Treasury, were traceable. Moreover, Appellant, in her Brief, has not referenced any evidence to establish that the monies withheld from her social security and pension fund disbursements are traceable. Appellant simply asserts in a conclusory manner that the provisions of Utah Code Ann. § 78-23-9(3) are unambiguous and Appellant's tax refund is exempt.

CONCLUSION

Appellant has failed to present any evidence that the monies withheld from her social security and pension fund disbursements are traceable. Moreover, the monies withheld from the Appellant's social security and pension fund disbursements are not traceable under any method, including the methods set forth under UTAH CODE ANN. § 78-23-9(3). Therefore, this Court should affirm the Order Disallowing Debtor's Claimed

Exemption in Tax Refunds entered by the United States Bankruptcy Court for the District of Utah.

DATED this 4th day of April, 2008.

PARSONS KINGHORN HARRIS
A Professional Corporation

A handwritten signature in black ink, appearing to read "R. Kimball Mosier", is written over a horizontal line.

R. KIMBALL MOSIER
Attorneys for R. Kimball Mosier,
Chapter 7 Trustee

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of April, 2008, I caused to be served, two (2) true and correct copies of the foregoing **BRIEF OF APPELLEE**, via U.S. Mail, postage prepaid thereon and addressed as follows:

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