

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In Re:

Howard and Sharon Hewitt CHAPTER 7
Debtors.

Bky. 97-33854

ORDER SUSTAINING
OBJECTION TO
EXEMPTIONS

This matter was heard on February 12, 1999, on objection to amended exemptions claimed by the Debtors, Howard and Sharon Hewitt, in their Amended Schedule C filed on January 19, 1999. Appearances are as noted in the record of the hearing. The Court: having heard arguments of counsel; having reviewed the briefs; and, now being fully advised in the matter, makes this ORDER pursuant to the Federal and Local Rules of Bankruptcy Procedure.

I

This bankruptcy case was filed on June 5, 1997. The First Meeting of Creditors was held in Mankato, Minnesota on July 9, 1997. The Debtors initially elected to use the exemptions provided by Minnesota state law instead of those provided by federal law. Compare 11 U.S.C. Section 522(d) with 11 U.S.C. Section 522(b)(2). In the Debtors' "Schedule C - Property Claimed As Exempt," they claimed the entire value of a personal injury settlement annuity as exempt property under M. S.A. Section 550.37(22).

The annuity resulted from the settlement of a personal injury action arising from a July 27, 1982 automobile-motorcycle accident. On June 20, 1985, Mr. Hewitt settled the claim by signing a release and settlement agreement with the defendants Mark Lidstrom, Northland Trailers, Inc., and their insurance provider, Northwestern National Insurance Company of Milwaukee, Wisconsin (Northwestern). According to the language of the settlement, Mr. Hewitt agreed to "accept the payments to be made pursuant to this Agreement in full compromise and settlement of all his claims against Northland and Lidstrom for damages on account of personal injuries." The consideration for Mr. Hewitt's release was the full payment of all agreed funds. Northwestern was required to furnish evidence "of an annuity contract in an

amount sufficient to satisfy and guarantee the payment obligations set forth," and it was "recognized and agreed that the payments. . . are guaranteed payments." It was agreed that Mr. Hewitt's only rights were "to the payments set forth therein as and when they are accrued" and that Northwestern would purchase and retain ownership of the annuity.

The annuity payment contract schedule called for approximately \$250,000.00 to be paid Mr. Hewitt on or about May 30, 1985. Additionally, Mr. Hewitt received approximately \$41,990.63 for medical, wage loss and other claims arising out of the accident. Further, the annuity contract called for the payment of approximately \$30,000.00 to Mr. Hewitt for additional and future medical expenses, and mandated that he would receive \$1,000.00 per month starting on or about July 1, 1985, with the last payment due on August 1, 1991, for a total payment over the six years of \$74,000.00. Finally, the Agreement provided that Mr. Hewitt would receive periodic lump sum payments starting on or about September 1, 1991 and ending on or about September 1, 2016 as follows:

Date	Amount
September 1, 1991	15,000.00
September 1, 1996	20,000.00
September 1, 2001	25,000.00
September 1, 2006	30,000.00
September 1, 2011	35,000.00
September 1, 2016	250,000.00

The trustee objected to the claimed exemption on the ground that an annuity arising from a pre-petition settlement of a personal injury claim was not properly exempt as a "right of action" under M.S.A. Section 550.37, subd. 22. Subsequently, the trustee moved the Court for summary judgment requesting that the Court disallow the exemption claim and declare the remaining annuity payments to be property of the bankruptcy estate. In response, the Debtors moved the Court for summary judgment requesting that the Court allow the exemption claim or, in the alternative, allow the Debtors to exempt the annuity payments under M.S.A. Section 550.37, subd. 24.

Hearing on the motions was held on November 4, 1998. The Court granted the trustee's Motion for Summary Judgment, sustained the trustee's objection, and, adjudicated that all proceeds from the personal injury settlement annuity, including future payments, were property of the bankruptcy estate. The order for judgment provided, in part:

all proceeds of the Northwestern settlement, including future payments, are property of the bankruptcy estate.

Memorandum Order Granting Summary
Judgment, December 18, 1998.

Judgment was entered pursuant to the order, and contained identical language:

all proceeds of the Northwestern settlement, including future payments, are property of the bankruptcy estate.
Judgment, December 18, 1998.

On December 30, 1998, the Debtors filed their Notice of Appeal from the judgment, but later caused dismissal of the appeal by motion. They filed their Amended Schedule C, claiming the Northwestern settlement exempt under 11 U.S.C. Section 522(d), on January 19, 1999, the same day that the appeal was dismissed.

II

The trustee argues that the Court's December 18, 1998, order and judgment are res judicata and bar further claim of exemption by the Debtors in the Northwestern settlement. The Court agrees.

Res judicata precludes litigation of claims that were involved in earlier proceedings between the same parties. "Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action." Lane at 741. Thus, res judicata precludes the relitigation of a claim, or closely related claims, on grounds that were raised or could have been raised or asserted in a prior action. In re: Frank Miller et.al., 153 B.R. 269, 272 (Bankr. D. Minn. 1993), quoting Lane v. Peterson, 899 F.2d 737, 741 (8th Cir.1990) (citations omitted).

The operative question in each case is whether the claims arise out of the same nucleus of facts. As stated in Restatement (Second) of Judgments, [t]he present trend is to see claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights. The transaction is the basis of the litigative unit or entity which

may not be split. Restatement (Second)
of Judgments 24, comment a at 197 (1980)
[footnote omitted].
Lane, at p. 743.
Miller, 889 F.2d at 275.

The debtors, in *In re: Frank Miller et. al.*, initially sought to exempt certain pension plans from their estates, but failed. Later in the cases, the debtors sought to exclude the plans from their estates under 11 U.S.C. Section 541(c)(2). In rejecting the exclusion attempt, this Court said:

The actions involve the same nucleus of operative facts. Both the prior and present proceedings involve claims of entitlement to the pension plans. The original actions involved objections by the Trustee to the Debtors' attempts to exempt the property from the estates. In those matters, the property was conclusively presumed to be estate property, subject to exemption under Section 522. Under the Debtors' present theory, they contend that their interests in the plans were never property of their estates because they are excluded under Section 541(c)(2). The claim is entitlement. Both the Section 522 and Section 541 involve determinations of entitlement to the vested pensions at filing as between the Debtors and their estates. Essentially, Section 522 and Section 541 can be viewed as the basis for variant forms of relief asserted by the Debtors and the Trustee as to their competing claims of entitlement to the pension plan funds.

The Debtors' reliance, in the second proceeding, on different substantive law and new legal theories, does not preclude the operation of *res judicata*. Contrary, the doctrine prevents a party from suing on a claim that is in essence the same as a previously litigated claim, but is dressed up to look differently. Lane at 744.

Here, both the exemption and exclusion actions arise out of the same nucleus of operative facts because they involve a determination of entitlement to the vested pensions at filing as between the Debtors and their estates. The basis for the actions originated at filing. The motivation of both actions is singular, to establish entitlement to the same property. Accordingly, all of the

requisites of res judicata exist to preclude the Debtors from relitigating the claim of entitlement to the pension funds pursuant to the newly raised theory of exclusion under Section 541(c)(2). Miller, 899 F.2d at 275.

The same reasoning applies in this case. Here, the claim asserted by the Debtors in their Amended Schedule C is the same claim litigated in the earlier objection, that is, entitlement to the Northwestern settlement. When the claim was first placed in issue, it was incumbent upon the competing parties to assert all alternative theories of entitlement to the property. In re: Marshall, 224 B.R. 399, 400 (Bankr. D. Minn. 1998), (Once the exemptibility of the sexual harassment claim was put at issue, it was incumbent upon the debtor to raise all grounds that were available to him in support of his claim that the cause of action was exempt. Not having done so, he cannot relitigate the same claim again. Res judicata prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding.)

The Debtors argue that they are entitled to pursue the exemption despite the earlier proceeding, citing Fed. R. Bankr. P. 1009, which provides in part:

(a) General right to amend

A voluntary petition, list, schedule, or statement may be amended by the debtor as a matter of course at any time before the case is closed. The debtor shall give notice of the amendment to the trustee and to any entity affected thereby....

However, the amendment of a schedule cannot nullify a final order or judgment. The general right to amend Schedule C does not necessarily entitle a debtor to a particular exemption claimed in the newly amended Schedule.

III

Based on the forgoing, it is hereby ORDERED that: the Trustee's objection to the newly claimed exemption by the Debtors, through their Amended Schedule C filed January 19, 1999, of the Northwestern settlement annuity is sustained; and, all proceeds of the Northwestern settlement, including future payments, are property of the bankruptcy estate.

Dated: March 4, 1999. By The Court:

