

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In re:

Chapter 7 Case

Paul M. Newbury and
Judith Newbury,

BKY Case No. 3-90-1243
ADV. No. 3-90-164

Debtors.

Kristin D. Basinger,

Plaintiff,

ORDER GRANTING
SUMMARY JUDGMENT

v.

Paul M. Newbury, Brian F.
Leonard, Trustee of the
Bankruptcy Estate of Paul
and Judith Newbury,

Defendants.

This matter came before the Court on October 18, 1990 for a scheduling conference with cross motions for Summary Judgment by the parties. The Plaintiff was represented by Michael J. Iannacone. Defendant Paul M. Newbury was represented by John F. Wagner. No appearance was made on behalf of Defendant Brian F. Leonard, Trustee. This matter was deemed submitted for decision by the Court upon the filing of the briefs, and no oral argument was requested. Based upon all the files and records in this case, and being fully advised in the premises, the Court now makes the following Order pursuant to the Federal and Local Rules of Bankruptcy.

I.
FACTS

Prior to filing, Defendant Paul M. Newbury f/k/a Paul Michael Darnell (hereinafter "Newbury") married the Plaintiff, Kristin D. Basinger f/k/a Kristin Diane Darnell (hereinafter "Basinger") on May 9, 1981. Their first marriage was annulled on May 6, 1982, but they were remarried December 21, 1982. On June 6, 1989, they were divorced. In reviewing the parties' marital assets, their Divorce Decree discussed Newbury's pension plan, available to him from his employment with the United States Department of Transportation, Federal Aviation Administration, as an air traffic controller, and awarded \$10,544 of that pension to Basinger.

In Schedule B-4 of the Debtors' petition, filed March 21, 1990, Newbury claimed \$32,000 of his pension as exempt property under both M.S.A. Section 550.37, Subd. 24, and 5 U.S.C. Sections 729, 2265, and 8346(a). On October 11, 1990, Basinger filed her Complaint seeking a determination that the divorce decree awarded her \$10,544 of Newbury's pension for her separate property in its

distribution of marital assets. On August 31, 1990, Newbury filed his answer, denying that the divorce decree's award of \$10,544 of his pension to Basinger is her separate property, and arguing that she has, at most, a claim in the form of a judicial lien under 11 U.S.C. Section 101(32). He also argues that this lien impairs an exemption to which he would otherwise be entitled under 11 U.S.C. Section 522(f)(1), and which may be avoided under 11 U.S.C. Section 506(d). Cross motions for Summary Judgment were filed on October 9, 1990 for Defendant Newbury, and October 11, 1990 for Plaintiff. On October 18, 1990, a scheduling conference was held, at which the parties agreed that the Court should deem this matter submitted on the pleadings, with neither party seeking oral argument.

II.

ISSUE

Is the \$10,544 interest in Newbury's pension plan awarded Basinger by their divorce decree her separate property?

III.

DISCUSSION

The parties have agreed that the sole issue which must be decided is the legal status of Basinger's \$10,544 interest in Newbury's pension: it is either her separate property or she has a claim against the Debtors' estate. If the pension interest is her separate property, it is neither available to the bankruptcy trustee for administration, nor available to the Debtors as exempt property. Accordingly, a decision granting summary judgment in favor of either party is appropriate for resolution of this controversy.

The caselaw is clear in this District concerning the legal status of a pension award of this type to an ex-spouse pursuant to a divorce decree. The recent case *Bush v. Taylor* (In re *Bush*), 912 F.2d 989 (8th Cir. 1990) controls. In that case, the Eighth Circuit decided that such an award constitutes separate property belonging to the ex-wife. Therefore, it may be neither claimed by the Debtor as exempt property, nor liquidated by the Chapter 7 trustee for the benefit of creditors as property of the estate. *Id.* at 994. Accordingly, the Plaintiff is entitled to summary judgment.

NOW, THEREFORE, IT IS ORDERED:

1. Summary judgment for the Plaintiff that the divorce decree awarded her \$10,544 as her separate property is granted.
2. Summary judgment for the Defendant is denied.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated:

Dennis D. O'Brien
U.S. Bankruptcy Judge