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Attest:

Melissa Beasley
Deputy Clerk, Bankruptcy Court

Bruce T. Beasley
Honorable Bruce T. Beasley
United States Bankruptcy Judge



Entered on Docket
March 27, 2014



FILED

APR 02 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

No. 65335

In re:

ERNEST AUGUST BECKER, V,

Debtor.

Case No.: BK-S-13-14932-BTB

Chapter 7

Hearing Date: February 19, 2014

Hearing Time: 2:00 p.m.

**ORDER CERTIFYING QUESTION OF LAW
TO THE NEVADA SUPREME COURT**

I. Question of Law Certified - Nev. R. App. P. 5(c)(1)

This court requires clarification as to whether a debtor may properly claim an exemption in his entire stock interest pursuant to Nev. Rev. Stat. § 21.090(1)(bb) and the incorporated provisions of Nev. Rev. Stat. § 78.746. The issue is before this court as a result of objections made by several creditors and interested parties, upon which the Chapter 7 Trustee joined, to Debtor's claimed exemptions for the entire interest in stock he holds in two closely held corporations on the basis that Debtor's exemption pursuant to NRS 21.090(1)(bb) is expressly limited to the non-economic rights by the incorporated provisions of NRS 78.746.

As shown below, this court requires clarification regarding the proper interpretation of the stock that is exempt under NRS 21.090(1)(bb) and the incorporated provisions of NRS 78.746 in order to resolve the particular dispute in the above-captioned case. This issue as to

1 whether a debtor is entitled to claim an exemption in his entire interest in stock that otherwise
2 meets the requirements of NRS 78.746(2)(c), or if the debtor's exemption is limited to his non-
3 economic rights, is determined by state law, and there is no controlling precedent in the
4 decisions of the Nevada Supreme Court. As clarification concerning the appropriate statutory
5 interpretation of the above referenced statutes is necessary to resolve the objections to debtor's
6 claimed exemptions presently at issue, this court believes that the standard for Rule 5
7 certifications set forth in Volvo Cars of North America, Inc. v. Ricci, 122 Nev. 746, 137 P.3d
8 1161 (Nev. 2006) has been met.

9 **II. Statement of Facts - Nev. R. App. P. 5(c)(2)**

10 On June 5, 2013, Ernest August Becker, V ("Debtor") filed a voluntary Chapter 7
11 petition. On his Personal Property Schedule "B," the Debtor lists "Ensworth Corporation Stock"
12 with a value of \$1,362,000 ("Ensworth Stock"), and also lists a stock or other interest in "Eagle
13 Rock Gaming, Inc." with a value of \$219,000 ("Eagle Rock Gaming Stock"). On his Amended
14 Schedule "C," the Debtor claims a \$1,362,000 exemption in the Ensworth Stock pursuant to
15 Nev. Rev. Stat. § 21.090(1)(bb). On his Amended Schedule C, the Debtor also claims a
16 \$219,000 exemption in the Eagle Rock Gaming Stock pursuant to Nev. Rev. Stat. §
17 21.090(1)(bb).

18 On October 31, 2013, creditors and interested parties Ernest A. Becker, IV, individually,
19 Ernest A. Becker, IV and Kathleen C. Becker, as Trustees of the Ernest A. Becker IV and
20 Kathleen C. Becker Family Trust, EB Family Holdings, LLC, Kimberly Riggs, Sallie Becker and
21 Brian Becker (collectively the "Objecting Parties") filed an Objection to Claimed Exemptions.
22 Objecting Parties dispute Debtor's claimed exemptions in both Ensworth Stock and Eagle Rock
23 Gaming Stock. On November 1, 2013, William A. Leonard, the Chapter 7 Trustee ("Trustee")
24 filed its Joinder to Objection to Claimed Exemptions.

25 Debtor has claimed an exemption for the entire stock interest he holds in Ensworth Stock
26 and Eagle Rock Gaming Stock. In challenging these claimed exemptions, the Objecting Parties

1 and the Trustee believe this court should determine that Debtor is only entitled to exempt his
2 non-economic interest, and that Debtor's economic interests, including all profits and
3 distributions related to Debtor's interests, are property of the estate which must be paid to the
4 Trustee for the benefit of the estate and creditors.

5 A hearing was held on February 19, 2014. For the reasons stated below, this court cannot
6 properly decide whether Debtor's claimed exemptions are supported under Nevada law without a
7 definitive ruling from the Nevada Supreme Court.

8 **III. Nature of Controversy - Nev. R. App. P. 5(c)(3)**

9 "When a debtor files a Chapter 7 bankruptcy petition, all of the debtor's assets become
10 property of the bankruptcy estate,¹ subject to the debtor's right to reclaim certain property as
11 'exempt.'²" Tyner v. Nicholson (In re Nicholson), 435 B.R. 622, 629-30 (B.A.P. 9th Cir. 2010)
12 (citation omitted). The Bankruptcy Code specifies the types of property debtors may exempt,
13 and 11 U.S.C. § 522(b) permits a debtor to choose the exemptions afforded by state law or the
14 federal exemptions listed in 11 U.S.C. § 522(d). Id. (citation omitted).

15 In this case, Debtor is seeking to exempt the stock interest he holds in Ensworth Stock
16 and Eagle Rock Gaming Stock pursuant to NRS 21.090(1)(bb). In relevant part, the statute
17 provides:

18 1. The following property is exempt from execution, except as
19 otherwise specifically provided in this section or required by
20 federal law:

21 (bb) Stock of a corporation described in subsection 2 of
22 NRS 78.746 except as set forth in that section.

23 Nev. Rev. Stat. § 21.090(1)(bb). Subsection 2 of NRS 78.746, provides in its entirety:

24 2. Subject to the provisions of NRS 78.747, this section:

25 ¹ See 11 U.S.C. § 541

26 ² See 11 U.S.C. § 522(l)

1 (a) Provides the exclusive remedy by which a judgment
2 creditor of a stockholder or an assignee of a stockholder
3 may satisfy a judgment out of the stock of the judgment
4 debtor. No other remedy, including, without limitation,
5 foreclosure on the stockholder's stock or a court order for
6 directions, accounts and inquiries that the debtor or
7 stockholder might have made, is available to the judgment
8 creditor attempting to satisfy the judgment out of the
9 judgment debtor's interest in the corporation, and no other
10 remedy may be ordered by a court.

11 (b) Does not deprive any stockholder of the benefit of any
12 exemption applicable to the stockholder's stock.

13 (c) Applies only to a corporation that:

14 (1) Has fewer than 100 stockholders of record at
15 any time.

16 (2) Is not a publicly traded corporation or a
17 subsidiary of a publicly traded corporation, either in
18 whole or in part.

19 (3) Is not a professional corporation as defined in
20 NRS 89.020.

21 Nev. Rev. Stat. § 78.746(2).

22 It appears the Trustee concedes, and the Objecting Parties do not otherwise contend, that
23 the Ensworth Stock and the Eagle Rock Gaming Stock fit within the qualifications set forth in
24 NRS 78.746(2)(c). Therefore, the issue in this case is not whether the Debtor's above-referenced
25 stock is exempt, but rather the extent to which the stock is exempt.

26 The Debtor argues NRS 78.746(1)³ is not triggered if a stock is first determined to be
exempt under NRS 21.090(1)(bb) and NRS 78.746(2)(c), with the exemption being protected by
NRS 78.746(2)(b). The Debtor further argues that the stock is either exempt or it is not, and
NRS 78.746(1) is only applicable if the stock is found to be not exempt. Accordingly, the

³ On application to a court of competent jurisdiction by any judgment creditor of a
stockholder, the court may charge the stockholder's stock with payment of the unsatisfied
amount of the judgment with interest. To the extent so charged, the judgment creditor has only
the rights of an assignee of the stockholder's stock. Nev. Rev. Stat. § 78.746(1).

1 Debtor contends there is no allowable bifurcation of stockholder rights if the stock is exempt,
2 and if it is exempt, no part of that exemption can be denied.

3 Alternatively, the Objecting Parties and the Trustee insist the remedy for creditors set
4 forth in NRS 78.746(1) and NRS 78.746(2)(a) is an express exception to the exemption of NRS
5 21.090(1)(bb). They further assert that NRS 78.746 and all of its subsections, including
6 78.746(1) and 78.746(2)(a), expressly apply to closely held corporations described in 78.746(c),
7 and only to such closely held corporations. Therefore, NRS 78.746(1) and NRS 78.746(2)(a)
8 must apply to the stock of such closely held corporations if those portions of the statute are to
9 have any meaning or application at all.

10 In determining that both arguments present conceivable interpretations of the relevant
11 statutes, and after its own careful examination, this court remains perplexed; and now seeks
12 guidance from the Nevada Supreme Court. On one hand, the remedy provision of NRS 78.746
13 appears to grant this court discretion to issue a charging order against Debtor's stock wherein it
14 states "the court may charge the stockholder's stock . . . [t]o the extent so charged, the judgment
15 creditor has only the rights of an assignee⁴ of the stockholder's stock." Nev. Rev. Stat. §
16 78.746(1) (Emphasis added). However, subsection 2, rather contrarily, states that "[NRS
17 78.746] [d]oes not deprive any stockholder of the benefit of any exemption applicable to the
18 stockholder's stock." Nev. Rev. Stat. § 78.746(2)(b). How can the statute effectively grant the
19 court discretion in determining whether a certain portion of stock is exempt while
20 simultaneously precluding the court from depriving the stockholder of the benefit of any
21 exemption applicable to its stock?

23
24 ⁴ The statute defines "rights of an assignee" as "the rights to receive the share of the
25 distributions or dividends paid by the corporation to which the judgment debtor would otherwise
26 be entitled. The term does not include the rights to participate in the management of the business
or affairs of the corporation or to become a director of the corporation." Nev. Rev. Stat. §
78.746(3).

1 **IV. Designation of the Parties - Nev. R. App. P. 5(c)(4)**

2 Pursuant to Fed. R. Bankr. Proc. 4003(c), the objecting party has the burden of proof with
3 respect to an objection to a debtor's claimed exemptions. Therefore, the court will designate the
4 Objecting Parties and the Trustee as the appellant, and the Debtor as the respondent.

5 **V. Names and Addresses of Counsel - Nev. R. App. P. 5(c)(5)**

6 Counsel for Debtor:

7 Mark Segal, Esq.
8 720 S. Fourth St., #301
9 Las Vegas, NV 89101

10 Counsel for Trustee:

11 Lenard E. Schwartz, Esq.
12 Jason A. Imes, Esq.
13 Schwartz & McPherson Law Firm
14 2850 South Jones Blvd., Suite 1
15 Las Vegas, NV 89146

16 Counsel for Objecting Parties:

17 Douglas J. Payne, Esq.
18 Fabian & Clendenin, P.C.
19 215 South State Street, Suite 1200
20 Salt Lake City, UT 84111

21 James H. Walton, Esq.
22 Nitz Walton & Heaton, LTD.
23 601 South Tenth Street, Suite 201
24 Las Vegas, NV 89101

25 **VI. Order Regarding Certification**

26 Having complied with the provisions of Nev. R. App. P. 5(c),

IT IS HEREBY ORDERED that upon entry, the Clerk of Court shall forward this Order
to the Supreme Court of the State of Nevada, Capital Complex, 201 South Carson St., Carson
City, Nevada 89701, under the seal of the Clerk of this court; and

IT IS FURTHER ORDERED that upon receipt of the opinion of the Nevada Supreme
Court, this matter shall be transferred to the Bankruptcy Court for further proceedings consistent
with the opinion of the Nevada Supreme Court.

1 Notice by CM/ECF Electronic Noticing to:

2 MONICA T. CENTENO

3 JASON A. IMES

4 WILLIAM A. LEONARD

5 LENARD E. SCHWARTZER

6 MARK B SEGAL

7 SHLOMO S. SHERMAN

8 U.S. TRUSTEE - LV - 7

9 JAMES H. WALTON

10 Notice by Mail to:

11 DOUGLAS J. PAYNE
12 215 S. STATE STREET, SUITE 1200
13 SALT LAKE CIT, UT 84111-2323

14 SHORT LINE EXPRESS MARKET
15 7330 EASTGATE RD STE 120
16 HENDERSON, NV 89011

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TRANSMITTAL FORM

TO: CLERK'S OFFICE, SUPREME COURT OF THE NEVADA, CAPITOL
COMPLEX, 201 Carson Street, Carson City, NV 89701-4702

FROM: BANKRUPTCY COURT FOR THE DISTRICT OF NEVADA -SOUTHERN
DISTRICT OFFICE NO. 0978/2

CASE NAME: ERNEST AUGUST BECKER IV

BANKRUPTCY NO: 13-14932-BTB

ADVERSARY NO: ADV

BANKRUPTCY JUDGE: BRUCE T. BEESLEY

**DATE ORDER CERTIFYING QUESTIONS OF LAW TO THE NEVADA SUPREME COURT
FILED:** 03/21/2014

DATE OF ENTRY OF ORDER: 03/21/2014

DATE BANKRUPTCY FILED: 06/05/2013

**DATE TRANSMITTAL OF ORDER CERTIFYING QUESTIONS OF LAW TO THE
NEVADA SUPREME COURT MAILED TO PARTIES:** 03/25/2014

DATE OF TRANSMITTAL: 03/25/2014

/S/ MELISSA BREAREY
DEPUTY CLERK