

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
Honorable Howard R. Tallman**

In re:)
)
MEL T. NELSON) **Case No. 03-10887 HRT**
SSN: xxx-xx-1970)
) **Chapter 7**
Debtor.)

ORDER SUSTAINING TRUSTEE’S OBJECTION TO EXEMPTION

This case comes before the Court on the Objection to Exemption filed by Creditor John Pico, and Trustee’s Objection to Claim of Exemption. Debtor Mel T. Nelson appears in person and by counsel James Hahn. Trustee, Harvey Sender appears by counsel, D. Bruce Coles. Creditor John Pico does not appear.

The Objection to Exemption filed by Creditor John Pico will be dismissed for the failure of Mr. Pico to prosecute his objection.

Prior to the hearing of this matter, held on September 15, 2003, Debtor and Trustee filed a Stipulation of Undisputed Facts for Exemption Hearing. Therefore, no evidence was taken at trial. The parties relied on the stipulated statement of facts and argued their respective positions to the Court based on those agreed facts. The Court has considered the pleadings filed in this matter and the arguments of counsel. In addition, the Court has reviewed its file and is ready to rule on Trustee’s Objection.

FACTS

1. Debtor is the 100% shareholder of Metro Auto, Inc., [hereinafter “Metro”].
2. In 1991, Metro entered into an agreement to sell its auto dealership.
3. John Pico acted as broker for that sale.
4. At the closing of said sale, Debtor received nothing for his equity in the dealership.
5. In related litigation, Debtor asserted that Pico structured the transaction such that Nelson would be compensated for his equity in the dealership assets and lands by entering into a contract [hereinafter, the “Service Agreement”] with the buyer, whereby Nelson would receive \$50.00 per car for every vehicle sold for the next seven years.

6. Debtor and the buyer never did enter into the Service Agreement; no services were ever performed pursuant to such agreement; and Debtor never received any compensation under the contemplated Service Agreement.
7. Subsequent to the sale, Debtor and Metro filed suit against Pico and others asserting claims arising from the sale. Of relevance to this proceeding, after a trial conducted by the District Court for the City and County of Denver, in case number 92CV491, Debtor and Metro received judgment on a jury verdict for:
 - a. \$6.1 million in actual damages for a claim of breach of fiduciary duty (in favor of Debtor and Metro); and
 - b. \$500,000.00 in actual damages for a claim of intentional interference with prospective business relations (in favor of Debtor only).
8. Jury instruction #15 in the underlying state court proceeding specifies that damages for breach of fiduciary duty should be determined according to “[a]ny economic loss which plaintiffs have had”
9. Jury instruction #16 with respect to the cause of action for breach of fiduciary duty instructs the jury to include “all compensation received by defendants . . . from the transaction.”
10. Jury instruction #17 instructs the jury that it may find in favor of the plaintiff, Mel Nelson, on the claim of intentional interference with prospective business relation if it finds all four of the following elements:
 - a. Plaintiff had a prospective business relation;
 - b. Defendants intentionally and improperly interfered with plaintiff’s prospective business relation;
 - c. Such interference prevented formation of a contract; and
 - d. Plaintiff suffered pecuniary harm resulting from the loss of the benefits of the relation.
11. In papers filed with the Bankruptcy Court for the Northern District of Texas, in an adversary proceeding relating to a bankruptcy case filed by John J. Pico in that district, Nelson asserted that Service Agreement was the exclusive source of the economic loss considered by the jury in making the breach of fiduciary duty damage award of \$6.1 million as well as the intentional interference with prospective business relations damage award of \$500,000.00.

12. Debtor's original schedules, filed on January 17, 2003, listed two judgments as property of the Debtor. Debtor listed a judgment in the amount of \$10 million against John J. Pico. He also listed a judgment in the same case against Pamela J. Pico in the amount of \$80,000.00, designated as a "Garnishment Traverse." Debtor claimed an exemption in both listed judgments as "earnings" pursuant to COLO. REV. STAT. §§ 5-5-105 & 13-54-104.
13. On February 21, 2003, Debtor filed amended schedules. On his amended schedules, Debtor lists the same two judgments, but the judgment against John J. Pico is shown as being in the amount of \$10.5 million and the judgment against Pamela J. Pico is shown in the amount of \$85,000.00. On his amended schedules, Debtor claims the John J. Pico judgment exempt as "proceeds of a claim for personal injury" under COLO. REV. STAT. § 13-54-102(1)(n) and shows the exempt amount as \$6,350,000.00. He also claims the Pamela J. Pico judgment exempt under the same statute in the exempt amount of \$51,000.00.
14. According to the stipulated statement of undisputed facts filed by the parties, Debtor's position is that both judgments are exempt as "earnings" under COLO. REV. STAT. § 13-54-104 or, alternatively, they are exempt as "proceeds of a claim for personal injury" under COLO. REV. STAT. § 13-54-102(1)(n).

DISCUSSION

At the trial of this matter, held on September 15, 2003, Debtor argued and asserted the following positions: 1) that a portion of the judgment against John J. Pico is exempt under COLO. REV. STAT. § 13-54-102(1)(n) as "proceeds of a claim for personal injury" in the amount of \$6.1 million; and 2) that a portion of the judgment against John J. Pico is exempt under COLO. REV. STAT. § 13-54-104 as "earnings" in the amount of \$250,000.00. The Court addresses the exemption claims as actually argued by the Debtor at trial and therefore deems all other previous characterizations of the exemption claim as well as the claim of exemption as to the judgment against Pamela J. Pico as superceded by the Debtor's presentation at trial.

1. Claim of exemption under COLO. REV. STAT. § 13-54-102(1)(n) as proceeds from a claim for personal injuries.

Debtor claims the portion of the judgment awarded to him, in the amount of \$6.1 million on account of the cause of action for breach of fiduciary duty, as exempt property. Under the Colorado exemption statute, a debtor may claim "[t]he proceeds of any claim for damages for personal injuries suffered by any debtor except for obligations incurred for treatment of any kind for such injuries or collection of such damages" exempt from "levy and sale under writ of attachment or writ of execution." COLO. REV. STAT. § 13-54-102(1)(n).

In re Keyworth, 47 B.R. 966, 973 (D. Colo. 1985), makes it clear that the Court is not bound by the label given to the cause of action in determining the exempt or non-exempt nature of the proceeds from that cause of action. Proceeds from a cause of action relate to a personal injury when the injury “impairs the well-being or the mental or physical health of the victim.” *Id.* at 973 (citing *Miller v. Carnation Co.*, 564 P.2d. 127 (Colo. Ct. App. 1977)). The distinction is whether the injury is an injury to the person or an injury to property. See *Callahan v. Slavsky*, 385 P.2d 674, 677 (Colo. 1963).

Two jury instructions in the underlying state court case relate to the calculation of damages with respect to the \$6.1 million jury verdict for breach of fiduciary duty. Jury instruction #15 specifies that damages should be determined according to “[a]ny economic loss which plaintiffs have had . . .” Instruction #16 instructs the jury to include “all compensation received by defendants . . . from the transaction.” Thus, it is clear from the instructions given to the jury that the jury was to make its determination of damages based solely upon its findings of the economic loss sustained by Mr. Nelson and Metro as well as the amount of compensation received by the defendants. Indeed, the characterization of the jury award of \$6.1 million as an award for strictly economic injury is consistent with the Debtor’s previous position, in the related Texas litigation against Pico, that the Service Agreement was the exclusive source for that damage award. This historical perspective only serves to reinforce this Court’s findings in its consideration of the stipulated facts presented by the parties.

The damages allowed under the applicable jury instructions were damages for purely economic injury. The Court finds that the jury award of purely economic damages is compensation for a property interest rather than compensation for a personal injury. See, e.g., *Messler v. Phillips*, 867 P.2d 128, 136 (Colo. Ct. App. 1993) (under statute awarding pre-judgment interest in personal injury actions, real estate broker’s breach of duty of honesty and fair dealing is not a personal injury); *Shannon v. Colorado School of Mines*, 847 P.2d 210, 215 (Colo. Ct. App. 1992) (under statute awarding pre-judgment interest in personal injury actions, breach of contract damages for lost pay was not personal injury). The Court, therefore, finds that the judgment in the amount of \$6.1 million for breach of fiduciary duty is not exempt property under COLO. REV. STAT. § 13-54-102(1)(n).

2. Claim of exemption under COLO. REV. STAT. § 13-54-104 as earnings.

Debtor claims an exemption of \$250,000.00 (one-half of the \$500,000.00 jury award) under COLO. REV. STAT. § 13-54-104(2)(a) which, in effect, exempts 75% of a debtor’s “disposable earnings” from garnishment or levy under execution or attachment.

In the underlying state court action, the jury found for Nelson on all four of the following elements:

- a. Plaintiff had a prospective business relation;

- b. Defendants intentionally and improperly interfered with plaintiff's prospective business relation;
- c. Such interference prevented formation of a contract; and
- d. Plaintiff suffered pecuniary harm resulting from the loss of the benefits of the relation.

Therefore, the jury necessarily found that there never was any Service Agreement entered into between Nelson and the buyer of the dealership due to Pico's interference.

COLO. REV. STAT. § 13-54-104 defines earnings as "[c]ompensation paid or payable for personal services" But as stated in the parties' stipulated facts, there was never any executed contract for the provision of those personal services between the Debtor and the buyer, and the Debtor never performed any services pursuant to such agreement. Finally, no compensation was ever paid or payable for any anticipated personal services, so the Debtor had no "earnings" within the meaning of the exemption statute. Under such circumstances, COLO. REV. STAT. § 13-54-104 is inapplicable and cannot serve as a basis for the Debtor's claim of exemption.

The Court could not locate any Colorado cases on point. However, the following cases involve other types of property found not to be exempt earnings under statutes substantially similar to the Colorado statute.

1. *Kokoszka v. Belford*, 94 S.Ct. 2431 (1974). The Court interpreted 15 U.S.C. 1672, which is substantially similar to the Colorado wage garnishment exemption statute. It held that a tax refund is not earnings even though it is derived from earnings. The Court stated that "[t]here is every indication that Congress, in an effort to avoid the necessity of bankruptcy, sought to regulate garnishment in its usual sense as a levy on periodic payments of compensation needed to support the wage earner and his family on a week-to-week, month-to-month basis." *Id.* at 2436.
2. *In re Mahoney*, 100 B.R. 472 (Bankr. E.D. Mo. 1989) (Schermer, J.). Royalties on sale of invention are not earnings under Missouri exemption statute which defines earnings the same as the Colorado statute. *Id.* at 474.
3. *In re Zamora*, 187 B.R. 783 (Bankr. S.D. Fla. 1995). "Receivables owed to the Debtor's professional practice and monies he chose to distribute to himself from his practice or from his marina business are not exempt 'earnings.'" *Id.* at 784. That determination was made under a Florida statute that defines earnings substantially the same as Colorado statute. FLA. STAT. ANN. § 222.11.

All of the above listed cases involve property which is much closer in nature to actual earnings than the tort judgment which is at issue in this case. Consequently, the Court finds that no portion of Debtor's judgment, in the amount of \$500,000.00, on account of a cause of action for intentional interference with prospective business relation, is exempt property. Accordingly, it is

ORDERED that the Objection to Exemption filed by Creditor John Pico is hereby DENIED for failure to prosecute; it is further

ORDERED that Trustee's Objection to Claim of Exemption is hereby SUSTAINED. In accordance with said objection, the Court finds that no portion of the judgment of the District Court for the City and County of Denver, rendered in Debtor's favor against John J. Pico in case number 92 CV 491, in September of 1999, is exempt property in this bankruptcy case. The Court also finds that for the same reasons discussed above, and since the Debtor did not argue the merits of the exemption at trial, no portion of the related judgment against Pamela J. Pico, rendered in Debtor's favor in the same case, is exempt property in this bankruptcy case.

Dated this 1st day of October, 2003.

BY THE COURT:

/s/ Howard Tallman
Howard R. Tallman, Judge
United States Bankruptcy Court