FILED
U.S. BANKRUPTCY COURT
WESTERN DISTRICT OF N C

DEC 0 8 1995

BY

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION

In Re:	Case No. 95-50571
	Chapter 13
CHARLES JASON TENOR and SONYA LAZENBY TENOR,	
Debtors.	

JUDGMENT ENTERED ON DEC 0 8 1995

ORDER

This matter comes before the Court upon the Chapter 13 Trustee's Motion for Review dated October 6, 1995. In that pleading the Trustee takes issue with an employer's garnishment of a Debtor's paycheck to repay a loan owed to his employer's ERISA-qualified retirement plan. The Trustee contends that these monies are "disposable income" under 11 U.S.C. 1325(b) and are required to be paid into the Plan for disbursement to all creditors. The Debtor's employer, Food Lion, opposes this relief, contending that to do so forces an alienation of the Debtor's interests in the Plan in contravention of applicable ERISA law. Based on a review of the Court's records and in view of the stipulated facts and arguments made at hearing, the Court finds and concludes as follows:

FINDINGS OF FACT

The male Debtor, Charles Tenor ("Tenor"), is employed by Food Lion, Inc. ("Food Lion") and participates in the Food Lion, Inc. Profit Sharing Retirement Plan ("Food Lion Plan"). The Food Lion Plan is a qualified employee pension benefit plan under Section 3(2) of the Employee Retirement Income Security Act of 1974 ("ERISA") and Section 401(a) of the Internal Revenue Code of 1986.

The Food Lion Plan allows participants to borrow from their Plan accounts.

Prior to bankruptcy, Tenor used this option to take out a $14,750 loan from his plan account, and, in connection therewith, pledged his vested Plan account balance as security. The loan accrues interest at 9.25 percent per annum and is payable in 105 bi-weekly payments of $169.93. Repayment is achieved by the employer withholding these amounts from Tenor's wages. Under the loan documents, upon default, all or part of Tenor's account balance may be applied by the Plan Trustee to repay this debt. The most recent account statement indicates Tenor owed $10,380.49 to the Plan, as of October 20, 1995.

On August 24, 1995, the Debtors filed for Chapter 13 relief. Thereafter a plan was confirmed which contemplates payments of $635 per month for a period of sixty months, for an approximate twenty percent payout to unsecured creditors. The Debtors' Schedules revealed that $675.63 per month was being withheld from Tenor's monthly gross salary of $2,383.66, but did not reflect that a substantial part of this was going to repay this loan.

The Trustee subsequently learned that of this sum, approximately $339.86 was being withheld by Food Lion to repay the Food Lion Plan loan, with the Debtor's consent. Believing this garnishment to be prohibited by Bankruptcy Code Section 1306, the Trustee filed the current Motion.

CONCLUSIONS OF LAW

The question posed by this case is how are ERISA-qualified loans to be treated in a Chapter 13 Plan. This appears to be a case of first impression within this District. It is well settled that a debtor's interest in an ERISA- qualified plan is not property of the bankruptcy estate under section 541(c)(2). Patterson v. Schumate, 504 U.S. 753, 112 S.Ct. 2242, 119 L.Ed. 2d 519 (1992). It has also been established that a stream of payments made during retirement to an individual pursuant to an ERISA-qualified plan are not subject to garnishment. Hisquierdo v. Hisquierdo, 439 U.S. 572, 99 S.Ct. 802, 59 L. ED. 2d 1 (1979), U.S. v. Smith, 47 F.3d 681 (4th Cir. 1995). However, there appears to be no controlling law in this district as to whether a Debtor may use his future income to fully repay an ERISA plan loan while paying other creditors only a few cents on the dollar under his Chapter 13 case.

However, this same issue was addressed by the Sixth Circuit Court of Appeals in the case of In re Harshbarger, 66 F.3d 775 (6th Cir. 1995). The facts of that case are all but identical to those in the present dispute. In Harshbarger, the Debtors filed a Chapter 13 Plan which proposed to repay Ms. Harshbarger's debt to her ERISA plan account in full by a garnishment of her future paychecks. Outside creditors were to be paid only 40% under her bankruptcy Plan. The Bankruptcy Court dismissed the Harshbarger's case for their failure to comply with the disposable income

requirement of Section 1325, and the District Court affirmed. The matter then went to the Sixth Circuit on appeal.

The Sixth Circuit in reviewing the matter first considered Section 1325(b)(1)(B)(2) which stipulates that a debtor must apply all of his "disposable income" to make payments under the plan. "Disposable income," that Court noted, is defined under 11 U.S.C. § 1325(b)(1)(B) as "income which is received by the debtor and which is not reasonably necessary to be expended . . . for the maintenance or support of the debtor or a dependent of the debtor." 11 U.S.C. § 1325(b)(2). The Harshbarger's plan called for using $61.17 per month of disposable income to allow the female debtor to restore her interest in her ERISA plan. The Circuit Court conceded that such an expenditure may well be "prudent financial planning, but it is not necessary for the " maintenance or support" of the debtors." Harshbarger, 66 F.3d 775, 777, citing In re Scott, 142 B.R. 126, 133 (Bankr. E.D. Va. 1992).

As to the Debtors' contention that refusing to allow them to continue to repay the plan loan out of their future income would lead to a setoff against their plan account and therefore force an alienation of the employee's ERISA plan interest, the Sixth Circuit was less than sympathetic. It concluded that while the Plan funds themselves are not estate property, the monies proposed to be used to repay the plan loan are estate property. Quoting another bankruptcy decision, In re Jones, 138 B.R. 536, 539 (Bankr. S.D. Ohio 1991), the Harshbarger court then opined, "'[i]t would be unfair to the creditors to allow the Debtors in the present case to

commit part of their earnings to the payment of their own retirement fund while at the same time paying their creditors less than a 100% dividend.'"

This Court agrees with Harshbarger and the Scott and Jones cases upon which it relies. Under Chapter 13, property of the estate includes the Debtor's postpetition earnings. 11 U.S.C. § 1306. The biweekly payments that Food Lion is withholding from Tenor's earnings to repay his Plan loan are property of the chapter 13 estate. Under Section 1325 these monies are not necessary to the maintenance and support of the debtor or a dependant and, as disposable income, must be applied towards the Plan.

The Debtor is, in effect, attempting to repay himself 100 percent of what he borrowed from himself while paying third parties only 20 percent of what he owes them. This is not proper, not only because of its obvious unfairness but also because a plan loan is not really a debt in the bankruptcy sense of the term.
Bankruptcy Judge Shelly's remarks in this regard in the Scott case are illuminating. On similar facts, the Scott court concluded that the Debtor's obligation to repay his ERISA plan loan was not a true debt: "[t]he obligation on the note is not a debt in that the debtor merely withdrew money from his own account and substituted a note for the money taken." Id. at 131. The Scott court's rationale applies in this case. If the Debtor defaults on the Food Lion plan loan, the plan's only remedy is to reduce the Debtor's vested plan account balance. This is not an obligation which may be pursued against the Debtor or other assets.

For this reason the Court concludes that not only may this "loan" be repaid by garnishment, the claim is also not entitled to share out of this estate, at least not until all true creditor's claims are satisfied.

Based on the forgoing, Food Lion and the Food Lion Plan Trustee shall immediately cancel their garnishment of the Debtor's wages. Further, the Debtors' Plan shall be modified to increase their monthly payments by the equivalent of the $169.93 biweekly garnishment payments, which increased payments shall continue until thirty six monthly payments are received by the Trustee. At that point the plan payment amount shall return to the current monthly payment amount for the remainder of the plan term.

IT IS SO ORDERED.

This the 8th day of Dec., 1995.

United States Bankruptcy Judge