UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA

In re **MICHAEL A EMERSON**, Debtor.	Case No. **05-62495-13**

MEMORANDUM OF DECISION

At Butte in said District this 29th day of December, 2005.

On July 29, 2005, Debtor filed this chapter 13 case. On August 3, 2005, Mountain West Bank ("MWB") filed proof of claim no. 1, claiming a secured claim in the amount of $64,292.34. On September 21, 2005, Debtor filed an objection to Mountain West Bank's proof of claim, based on the following grounds:

> 1. [MWB] has filed a secured Proof of Claim in the amount of $64,292.34. The security for the claim is real estate.
>
> 2. The Debtor does not own any real estate. The Debtor has co-signed a mortgage loan with his wife who is the titled owner of the real estate. The Debtor is liable and obligated for the debt but because the Debtor does not own the collateral for the loan the claim is unsecured as to him.

Debtor requests that MWB's claim be disallowed as a secured claim pursuant to 11 U.S.C. §§ 506(a)(1) and 502(b)(1) and be allowed as an unsecured nonpriority claim.

James A. Patten, of Billings, Montana, represents the Debtor. Amy Randall, of Helena, Montana, represents Mountain West Bank. Pursuant to the stipulation of the parties, all briefing has been filed and this contested matter is ripe for a decision. This memorandum contains the Court's findings of fact and conclusions of law.

STATEMENT OF THE FACTS

The facts upon which this case is to be decided are set out in the Stipulation of Fact dated October 20, 2005. The facts are:

1. Michael Emerson is married to Adele B. Boudreau Emerson n/k/a Adele B. Emerson.

2. Michael Emerson and Adele Boudreau Emerson have been married for 15 years.

3. During the marriage, Adele Boudreau Emerson acquired, in her name, certain real property situated in Jefferson County, Montana, which she sold reserving 17 acres, more particularly described as :

> Tract A1 of C.O.S. No. 207700, Folio 631-A located in the SE¼ of Section19, Township 9 North, Range 2 West, P.M. Montana, Jefferson County.

4. On or about April 6, 2005, Michael Emerson and Adele Boudreau Emerson executed a Promissory Note in favor of the Bank.

5. At the same time the Promissory Note described above was executed, Adele B. Emerson executed a Montana Deed of Trust in favor of Mountain West Bank to secure said Promissory Note. The Trust Indenture was duly recorded with the Jefferson County Clerk & Recorder on the 30th day of April, 2004.

6. Mountain West Bank has a perfected lien by reason of the Montana Deed of Trust upon the property described in paragraph 3 *supra.*

7. The balance due to Mountain West Bank as of the commencement of this case was $64,333.31 with per diem interest accrual of $11.4566.

8. Since the commencement of this bankruptcy case, the regular monthly installments due under the Promissory Note described in paragraph 3 *supra* has been paid in accordance with

the terms thereof. The loan is current.

In Debtor's brief in support of his objection to MWB's proof of claim, Debtor states on page 6: "There is no divorce pending by the Debtor as of the commencement of this case." In note 2, page 6, of Debtor's brief, Debtor states: "While the Debtor and the Bank did not stipulate to this fact, the Statement of Financial Affairs, ¶ 4 discloses no pending divorce." MWB confirms Debtor's above statements in its reply brief, at page 5, by stating: "Accordingly while [§] 541(a)(5)(B) is not applicable in the instant case, as [MWB] is not aware that the Emersons are engage in divorce proceedings, [§] 541(a)(1) remains applicable, and under such provision, the bankruptcy estate has an equitable interest in the Shadow Ridge property."

CONTENTIONS

Debtor argues the following contentions: (1) The debtor does not have a present interest in his wife's property; (2) [MWB]'s argument renders §541(a)(5)(b) meaningless; (3) Even if [Debtor's expectation interest] is property of the estate, it has no value; and (4) In any event, the bank does not have a perfected lien on the debtor's interest.

MWB argues: (1) While Debtor is not the titled owner of the above described property, the property is part of his bankruptcy estate because Debtor maintains an interest in the property through his marriage to his wife; (2) The property is a part of the Debtor's bankruptcy estate because the property is under the joint management and control of the Debtor.

DISCUSSION

FED.R.EVID. 201(c) and (f) permit the Court to take judicial notice of any adjudicative facts at any time. The question becomes whether the statements made within the Statement of Financial Affairs at ¶ 4 are evidential or judicial admissions, concerning whether litigation has,

as of the date of the filing of the bankruptcy petition, been initiated to dissolve Debtor's marriage. Chief Judge Lindquist, in *In re Earl*, 140 B.R. 728, 730-31 n.2 (Bankr. N.D.Ind. 1992), stated in a note:

> . . . a bankruptcy court is duty bound to take judicial notice of its records and files. (citation omitted).
>
> The Court is aware that there is a very crucial distinction between taking judicial notice of the fact that an entity has filed a document in the case, or in a related case, on a given date, i.e., the *existence* thereof, and the taking of judicial notice of the truth or falsity *contents* of any such document for the purposes of making a finding of fact.
>
> However, the verified Schedules and Statements filed by a debtors(sic) are not just pleadings, motions or exhibits thereto. They are evidentiary admissions. *In re Cobb*, 56 B.R. 440, 442 n.3 (Bankr.N.D. Ill. 1985). See, Fed.R.Evid. 801(d)(2) (Admission by a party opponent not hearsay).

Judge Ginsberg's note, in *In re Cobb*, 56 B.R. 440, 442 n.3 (Bankr.N.D.Ill 1985), is instructive:

> Arguably, a question exists whether statements by a debtor in schedules filed with the court are judicial or evidential admissions. If the schedules are regarded as pleadings in this proceeding, the debtor's statements in the schedules are judicial admissions, conclusive unless the Court allows them to be withdrawn or amended. On the other had an evidential admission is not conclusive. (Citation omitted). Because the schedules were filed in this case in general, not in this particular contested matter, the Court does not view them as a "pleading" for purposes of the stay motion as such, and thus statements in the schedules are evidential rather than judicial admissions for these purposes. (Citation omitted). In addition, the statement of value in the schedules relates to value and is a matter of opinion rather than fact. As such, it probably cannot give rise to a judicial admission. . . .

Under ¶ 4 of the Statement of Financial Affairs, Debtor states that no suits, administrative proceedings, executions, garnishments and attachments exist against him as of the date of filing his bankruptcy petition. Such statement is an evidential admission as the statement of financial affairs were filed in general and not in this particular contested matter and the stipulated facts do not contain reference to whether a marital dissolution proceeding was pending on the date of

bankruptcy filing. The Court finds that no marital dissolution proceeding between Debtor and his wife existed as of the date of the filing of the bankruptcy case, given the contents of ¶ 4 of the statement of financial affairs and MWB's statement at page 5 of its reply brief that it is unaware of any dissolution proceedings involving Debtor and his wife. Such finding involves an evidential admission, which is not conclusively established as a judicial admission, but which has not been refuted by MWB, as noted by the statement in its reply brief.

The following federal and state statutory provisions and case law impact the Court's analysis. What is property of the bankruptcy estate? Section 541(a) of Title 11 provides, in pertinent part:

> (a) The commencement of a case under section 301 . . . of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
>
> > (1) Except as provided in subsection (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.
> >
> > (2) All interests of the debtor and te debtor's spouse in community property as of the commencement of the case that is –
> >
> > > (A) under the sole, equal, or joint management and control of the debtor; or
> > >
> > > (B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

As noted above in § 541(a)(1), property of the bankruptcy estate is broadly defined and is intended to be all inclusive. *See Harsh Investment Corp. v. Bialac (In re Bialac)*, 712 F.2d 426, 430 (9th Cir. 1983).

> Congress derives its power to enact a bankrupt law from the federal Constitution and the construction of it is a federal question. Of course, where the Bankrupt Law deals with property rights which are regulated by the state law, the federal courts in bankruptcy will follow the state courts; but when the language of Congress indicates a policy requiring a broader construction of the statute than the state decisions would give it, federal courts cannot be concluded by them

Board of Trade of City of Chicago v. Johnson, 264 U.S. 1, 10, 44 S.Ct 232, 234 (1924); *see Farmers Markets, Inc. v. Brown (In re Farmers Market, Inc.)*, 792 F.2d 1400, 1403 (9th Cir. 1986). Property of the estate is a question of federal bankruptcy law. *See Monumental Life Ins. Co., v. Bibo, Inc. (In re Bibo, Inc.)*, 200 B.R. 348, 350 (9th Cir. BAP 1996) *opinion vacated on other grounds* 139 F.3d 659 (9th Cir. 1998). Federal bankruptcy law determines what particular right or interest held by a debtor under nonbankruptcy law is property of the bankruptcy estate, regardless of what label state law attaches to that particular right or interest. The existence and scope of the debtor's rights and interests in any property is controlled and determined by nonbankruptcy law. *Butner v. United States*, 440 U.S. 48, 55, 99 S.Ct 914, 918 (1979).

What is a claim? Section 101(5) of Title 11 provides: "The term 'claim' means – (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured; . . . ." "The term ' consumer debt' means debt incurred by an individual primarily for a personal, family, or household purpose." 11 U.S.C. § 101(8). The term 'debt' means liability on a claim." 11 U.S.C. § 101(12).

What is a secured claim? Under 11 U.S.C. § 506(a)(1), "[a]n allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an

unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim."

What *quid pro quo* remedy exists against Debtor? Under Montana statutory law, "[w]hen a trust indenture executed in conformity with [Small Tract Financing Act of Montana] is foreclosed by advertisement and sale, no other or further action, suit, or proceedings shall be taken or judgment entered for any deficiency against the grantor or his surety, guarantor, or successor in interest, if any, on the note, bond, other obligation secured by the trust indenture of against any other person obligated on such note, bond, or other obligation." MONT. CODE ANN. ("MCA") § 71-1-317 (2005). Pursuant to the Montana Supreme Court's decision in *First State Bank of Forsyth v. Chunkapura*, 226 Mont. 54, 63, 734 P.2d 1203, 1208-09 (1987), a lender electing to foreclose a security interest on an occupied, single-family residence by either advertisement and sale or under a judicial foreclosure on a trust indenture can not recover a deficiency judgment against the homeowner and the homeowner has no right of redemption for a period of one year or of possession after ten days from the date of sale. The Court does acknowledge that if a second or subsequent lienholder's lien is extinguished through foreclosure of a first lien, such subordinate lienholder may maintain a direct action on an existing note delivered to the subordinate lienholder. *First Interstate Bank of Kalispell, N.A. v. Wann*, 235 Mont. 111, 113-14, 765 P.2d 749, 750 (1988).

Montana is a separate property state and not a community property state.[1] *See In re the Marriage of Stone*, 274 Mont. 331, 339, 908 P.2d 670, 675 (1995) (J. Trieweiler dissent).

---

[1] The following states are community property states according to 5 L. KING, COLLIER ON BANKRUPTCY, ¶ 541.13[2] (15th ed. rev.): Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, Wisconsin

"Neither husband nor wife has any interest in the property of the other . . . ." MCA § 40-2-201.

> All the property of a married person owned before marriage and that acquired afterwards is his individual property. The married person may, without consent, agreement, and signature of his spouse, convey and transfer his individual property, real or person, including the fee simple title to real property, or execute a power of attorney for the conveyance and transfer thereof.

MCA § 40-2-202. "A husband and wife may hold real or personal property together, jointly or in common." MCA § 40-2-105.

During a dissolution of marriage proceeding, the state district court may "equitably apportion between the parties the property and assets belonging to either or both, however and whenever acquired and whether the title thereto is in the name of the husband or wife or both." MCA § 40-4-202(1). Such equitable apportionment or distribution law is for the protection of both parties and any children and does not involve community property law. *See In re the Marriage of Grecian*, 238 Mont. 125, 127-28, 777 P.2d 283, 284-85 (1989). As community property law is not involved or applied in Montana, the provisions of 11 U.S.C. § 541(a)(2) do not apply. *See* 5 L. KING, COLLIER ON BANKRUPTCY, ¶ 541.13 [1] (15th ed. rev.). Correspondingly, MWB's reliance on *Mantle v. Mantle (In re Mantle)*, 153 F.3d 1083, 1084-85 (9th Cir. 1998), is misplaced as the funds held in escrow arose from the sale of the debtor's marital home which had always been community property and had never been separate property. MWB's citation to *Committee of Tort Litigants v. The Catholic Diocese of Spokane (In re The Catholic Bishop of Spokane)*, 329 B.R. 304 (Bankr. E.D. Wash. 2005) and the analysis contained therein is consistent, albeit stated slightly differently, with the above discussion involving *Board of Trade* and *Butner*. Judge Williams in *Catholic Bishop* specifically states:

> The statute gives the Bankruptcy Court the exclusive jurisdiction to determine the

> parameters of the property of the estate. Identifying, administering and resolving competing claims to property of the estate is an essential function of a Bankruptcy Court. Even though the Bankruptcy Court must utilize state law in determining the nature and extent of the debtor's interest in property, the ultimate identification of property of the estate is exclusively within the jurisdiction of the Bankruptcy Court.

In re Catholic Bishop of Spokane, 329 B.R. at 315.

The provisions of MCA § 40-4-202(4) further state:

> The division and apportionment of marital property caused by or incident to a decree of dissolution, a decree of legal separation, or a declaration of invalidity is not a sale, exchange, transfer, or disposition of or dealing in property but is a division of the common ownership of the parties for purposes of:
> (a) the property laws of this state;
> (b) the income tax laws of this state; and
> (c) the federal income tax laws.

The above provision and other provisions set forth in Title 40, MCA, find their source from the Uniform Marriage and Divorce Act and from other states adopting and modifying the uniform act. Debtor cites *Steele v. Premier Capital, L.L.C. (In re Steele)*, 297 B.R. 589, 592 (Bankr. E.D. Mo. 2003), wherein Chief Judge Barta considers statutory provisions, Mo.Rev.Stat. § 452.330.1, which are similar, but not identical, to MCA § 40-4-202. Missouri law also inserts a presumption as to what is marital property, Mo.Rev.Stat. § 452.330.3, and defines marital property, Mo.Rev.Stat. § 452.330.2. The statutory provisions in Montana directly state that all property belonging to either or both husband and wife, however and whenever acquired and whether the title is in one name or in both constitutes marital property, subject to contributions by either spouse. MCA § 40-4-202(1). In analyzing the application of the Missouri statutory provisions, Chief Judge Barta states: ". . . the Court finds and concludes that, in the absence of a dissolution proceeding, the presumption created at Section 452.330 does not create an individual

interest in property that would be included in a Bankruptcy estate that is created under Title 11 of the United States Code." *Steele*, 297 B.R. at 592.

> As of the commencement of this case, the real property was held by the Debtor's spouse in her name only. . . . The record here reflects that a dissolution proceeding was neither pending nor anticipated in this matter. Under these circumstances, the Court finds and concludes that the Debtor did not hold a contingent or noncontingent marital interest in the real property as of the commencement of this case.

Steele, 297 B.R. at 592. The Court does note that the Debtor in *Steele* had signed a waiver of marital rights that had never been rescinded. No evidence exists in the case *sub judice* as to whether Debtor had signed any such waiver. The lack of such evidence, however, is not fatal to Debtor's argument. Debtor's wife is the sole owner of the property to which MWB's security interest attached. MWB is unquestionably secured by the wife's separate property and certainly in the event of default may proceed against the wife's property if the codebtor stay is modified under 11 U.S.C. § 1301.

As noted above, 11 U.S.C. § 506(a) provides that "[a]n allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim." Debtor, prior to filing bankruptcy had no ownership interest in the wife's separate property that serves as their residence. Under MCA § 40-4-202, Debtor may have a right to an equitable distribution of martial assets, but only if a marital dissolution proceeding is pending at the commencement of the bankruptcy case or is filed subsequent to the bankruptcy case for which Debtor acquires or becomes entitled to acquire so marital asset within

180 days after the filing date. *See* 11 U.S.C. § 541(a)(5). No marital dissolution has been filed. The judicial authority under state law to equitably apportion property and assets under MCA § 40-4-202 only arises "[i]n a proceeding for dissolution of a marriage, legal separation, or division of property following a decree of dissolution of marriage or legal separation by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to divide the property . . . ." MCA § 40-4-202(1). Furthermore, "[t]he division and apportionment of marital property *caused by or incident to* a decree of dissolution, a decree of legal separation, or a declaration of invalidity . . . is a division of the common ownership of the parties . . . ." MCA § 40-4-202-(4) (emphasis added). As Chief Judge Barta concluded in *Steele*, 297 B.R. at 592, this Court concludes in this case that in the absence of a dissolution proceeding and in a separate property, not a community property state, such as Montana, the common ownership of the married parties under MCA § 40-4-202 does not become effective in creating an individual interest for Debtor in his wife's real property until a dissolution proceeding is commenced in state court. The separate and individual interests mandated by MCA §§ 40-2-201 and -202 control. Consequently, Debtor's bankruptcy estate has no interest in his wife's separate and individual real property to which MWB's security interest may attach. *See* 11 U.S.C. § 502(a)(1).

MWB was aware of Debtor's lack of ownership interest in the real property and his wife's ownership interest in such property at the time the Montana Deed of Trust was signed solely by Debtor's wife securing the promissory note delivered to MWB. No marital dissolution proceeding was pending at the time Debtor's bankruptcy petition was filed and the record does not suggest such a proceeding has been filed subsequent to the bankruptcy filing. MWB acknowledges this fact in its brief. Debtor is obligated on the promissory note, but such

obligation creates an unsecured nonpriority claim for MWB as no property interest exists in Debtor's bankruptcy case securing "MWB's interest in the estate's interest in such real property." 11 U.S.C. § 506(a)(1). Such claim held by MWB is unenforceable against any property of the estate and such claim is not contingent or unmatured, and to that extent is disallowed as a secured claim, but is allowed as an unsecured nonpriority claim. *See* 11 U.S.C. § 502(b)(1).

IT IS ORDERED that a separate Order will be docketed providing that Debtor's objection to MWB's proof of claim no. 1 is sustained; that proof of claim no. 1 is disallowed as a secured claim; that proof of claim no. 1 filed by MWB is allowed as an unsecured nonpriority claim in the amount of $64,331.31; that Debtor shall file an amended chapter 13 plan on or before January 12, 2005, if necessary, and that the hearing on confirmation Debtor's chapter 13 plan, as amended if necessary, will be held on January 24, 2006, at 10:00 a.m., in Billings, Montana.

BY THE COURT

HON. RALPH B. KIRSCHER
U.S. Bankruptcy Judge
United States Bankruptcy Court
District of Montana