

FILED

ORDERED PUBLISHED

AUG 11 2017

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

5	In re:)	BAP No.	ID-16-1316-JuFB
)		
6	STEPHEN J. ANDERSON and)	Bk. No.	4:15-bk-40878-JDP
	MELANIE ANDERSON,)		
7)		
	Debtors.)		
8	_____)		
)		
9	STEPHEN J. ANDERSON; MELANIE)		
	ANDERSON,)		
10)		
	Appellants,)		
11)		
	v.)	O P I N I O N	
12)		
	GARY L. RAINSDON, chapter 7)		
13	trustee,)		
)		
14	Appellee.)		
15	_____)		

Argued and Submitted on July 27, 2017
at Pasadena, California

Filed - August 11, 2017

Appeal from the United States Bankruptcy Court
for the District of Idaho

Honorable Jim D. Pappas, Bankruptcy Judge, Presiding

Appearances: Aaron J. Tolson of Tolson & Wayment, PLLC argued for appellants, Stephen J. Anderson and Melanie Anderson; Jason R. Naess of Parsons, Smith, Stone, Loveland & Shirley, LLP argued for appellee, Gary L. Rainsdon, chapter 7 trustee.

Before: JURY, FARIS, and BRAND, Bankruptcy Judges.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 JURY, Bankruptcy Judge:

2
3 Appellants/debtors, Stephen J. Anderson and Melanie
4 Anderson (Debtors), pose the issue in this appeal as an open
5 question of law which splits the two divisions of the Idaho
6 Bankruptcy Court. Debtors argue that because under Idaho law a
7 licensed real estate professional does not earn a right to a
8 sales commission until the sales transaction closes (which took
9 place in this case after the petition date), such commission is
10 not property of the estate and belongs to Debtors. According to
11 Debtors, this is the position of the trustees in the Boise
12 Division. To the contrary, in the Pocatello Division, where
13 this case arises, trustees assert that such commissions are
14 estate property, following our decision in Tully v Taxel (In re
15 Tully), 202 B.R. 481, 483 (9th Cir. BAP 1996), a case arising in
16 California where under state law the right to a commission does
17 not require the transaction to close.

18 Despite Debtors' assertion that this is an open question,
19 we hold that the Ninth Circuit in Jess v Carey (In re Jess), 169
20 F.3d 1204 (9th Cir. 1999), has answered the question, ruling
21 that § 541¹ trumps any distinction in state law in this
22 instance, its broad sweep making the contingent right to a
23 commission estate property. Accordingly, WE AFFIRM.

24 ///

25 ///

26
27 _____
28 ¹ Unless otherwise indicated, all chapter and section
references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

I. FACTS²

1
2 The facts are not in dispute. Debtors filed their
3 chapter 7 petition on September 9, 2015 (Petition Date).
4 Debtors are both licensed real estate agents. As agents, they
5 were required to work under a broker. Accordingly, they
6 associated with Keller Williams Realty East Idaho (Keller), as
7 part of the Mike Hicks Realty Group (Hicks) team. Under
8 Keller's business model, Debtors spent the bulk of their time
9 interacting with buyers and sellers while Hicks' staff at Keller
10 prepared the marketing materials, photographed the properties,
11 and performed other administrative tasks. Keller also provided
12 training to its agents. For these services, Debtors paid Keller
13 a fee called a "cap."

14 Per their agreement with Keller, when Debtors earned a real
15 estate commission, it was paid directly to Keller. In turn,
16 Keller retained 36% of the commission until the \$18,000 cap was
17 met each year. After subtracting the amount applied to Debtors'
18 cap, Keller then cut two checks to split the balance of the
19 commission according to the Group/Team Contract. When Debtors
20 acted as the buyer's agent, the contract provided for a 60/40
21 split between Debtors and Hicks, respectively. When Debtors
22 were the listing agents, the contract provided for a 55/45 split
23 between Debtors and Hicks, respectively.

24 Keller encouraged its agents to have a separate business
25 entity into which the earned commissions were paid. The entity

26 _____
27 ² We borrow from the facts set forth in the bankruptcy
28 court's published memorandum decision at 558 B.R. 369 (Bankr. D.
Idaho 2016).

1 then paid the commission to the real estate agents as a salary.
2 Debtors organized a company called Melanie Anderson Realty,
3 Inc., but closed it before the Petition Date. After the
4 Petition Date, Debtors created a new business entity called
5 Bastille Enterprises, Inc. (Bastille). Melanie is the sole
6 shareholder of Bastille, while Stephen is an employee. Bastille
7 pays Debtors' business expenses and some of their personal
8 expenses. Bastille also pays a salary to both Stephen and
9 Melanie. Under the contract between Keller and Debtors, after
10 Keller receives a commission, Keller pays Debtors' share to
11 Bastille.

12 On the Petition Date, Debtors were involved in thirteen
13 real estate transactions where a sales contract had been
14 executed by the buyer and seller, but the sale had yet to close.
15 Each transaction closed postpetition and Keller paid Debtors'
16 share of the commission to Bastille.

17 On April 6, 2016, appellee/chapter 7 trustee, Gary L.
18 Rainsdon (Trustee), filed a motion for turnover of \$52,485.92 in
19 commissions that were paid to Debtors through Bastille.³
20 Trustee argued that the commissions were property of Debtors'
21 bankruptcy estate because they had performed the work necessary
22

23
24 ³ Through the thirteen transactions, Debtors had earned
25 approximately \$105,222.00 in commissions. The amount of
26 \$52,485.92 is the "Associate Commission" amount included in the
27 Associate Detail exhibits. The difference was paid to Hicks.
28 Trustee maintained that the \$52,485.92 amount was the amount he
could prove Debtors had control or custody over during the
pendency of the bankruptcy case. He did not pursue the
remaining balance of the commissions which went to Hicks, but
reserved his right to do so.

1 to earn the commissions prior to the Petition Date. Therefore,
2 the commissions were subject to turnover under § 542(a). In
3 response, Debtors argued that the commissions were not part of
4 their estate because the commissions were paid to Bastille.
5 Alternatively, Debtors asserted that if the commissions were
6 part of their bankruptcy estate, a portion of the work to earn
7 the commissions was performed postpetition. Debtors requested
8 the bankruptcy court to apportion the commission between the
9 pre- and postpetition period and order turnover of the portion
10 earned prepetition.

11 After an evidentiary hearing, the bankruptcy court ordered
12 simultaneous post-hearing briefing of the issues and took the
13 matter under advisement.

14 The bankruptcy court issued a memorandum decision, finding
15 that the commissions were property of Debtors' bankruptcy estate
16 under § 541(a)(1) because all Debtors' acts necessary to earn
17 the commissions were performed prepetition and therefore were
18 rooted in the pre-bankruptcy past. The court also noted that
19 under Idaho law, only a licensed real estate broker or
20 salesperson is entitled to collect a real estate commission.
21 Idaho Code § 54-2054. Therefore, as the licensed agents, the
22 commissions belonged to Debtors, not to Bastille. The
23 bankruptcy court concluded: "[T]hat Debtors had entered into a
24 contract with Keller to have their commissions paid to Bastille,
25 a corporation they created after their bankruptcy filing, does
26 not alter the result. Under § 542(a), a debtor must turn over
27 possession, **or account to the trustee**, for any property of the
28 estate." 558 B.R. at 374.

1 Finally, the court found that Debtors produced no evidence
2 which would allow it to apportion the commissions between pre-
3 and post-bankruptcy efforts. As a result, Debtors did not show
4 any portion of the commissions should be excluded from the
5 estate under the "personal services" exception in § 541(a)(6).
6 Therefore, the bankruptcy court ordered Debtors to turn over
7 \$52,485.92 to Trustee. Debtors filed a timely appeal from that
8 order.

9 II. JURISDICTION

10 The bankruptcy court had jurisdiction over this proceeding
11 under 28 U.S.C. §§ 1334 and 157(b)(2)(E). We have jurisdiction
12 under 28 U.S.C. § 158.

13 III. ISSUE

14 Whether the commissions, which were paid on contracts
15 entered into prepetition and deposited into the account of
16 Bastille postpetition, should be considered property of Debtors'
17 estate as of the date of the petition, thereby making them
18 subject to turnover under § 542(a).

19 IV. STANDARD OF REVIEW

20 Whether an asset is estate property is a conclusion of law
21 reviewed de novo. Groshong v. Sapp (In re MILA, Inc.), 423 B.R.
22 537, 542 (9th Cir. BAP 2010).

23 V. DISCUSSION

24 A. Legal Standards

25 Under § 542(a), an entity "in possession, custody, or
26 control, during the case, of property that the trustee may use
27 . . . shall deliver the property to the trustee, and account
28 for, such property or the value of such property," subject to

1 certain exceptions.

2 Section 541(a) provides that the filing of a bankruptcy
3 case creates an estate. The estate is "comprised of all the
4 following property, wherever located any by whomever held:

5 (1) . . . all legal or equitable interests of the debtor in
6 property as of the commencement of the case." This definition
7 of property of the estate has been broadly construed to
8 encompass a debtor's contingent interest in future payments, as
9 long as that interest is "sufficiently rooted" in the debtor's
10 prepetition past, even if that interest is reliant on future
11 contingencies that have not occurred as of the filing date.

12 Segal v. Rochelle, 382 U.S. 375, 379-80 (1966). In this
13 Circuit, any contingent interest of the debtor "sufficiently
14 rooted in the pre-bankruptcy past" is estate property, even if
15 the contingency is not satisfied until after the bankruptcy is
16 filed. See Neuton v. Danning (In re Neuton), 922 F.2d 1379,
17 1382-83 (9th Cir. 1990) (beneficial interest in an inter vivos
18 trust constituted property of the bankruptcy estate as debtor's
19 interest vested upon the death of the preceding beneficiary
20 which occurred after the bankruptcy petition was filed); Rau v.
21 Ryerson (In re Ryerson), 739 F.2d 1423, 1425-26 (9th Cir. 1984)
22 (contingent interests in payments due under a prepetition
23 contract were property of the estate and passed to the trustee).

24 An exception to the broad definition of property of the
25 estate is the postpetition earnings exception under § 541(a)(6).
26 That section provides that earnings from services performed by
27 an individual debtor after the commencement of the case are not
28 property of his or her estate. In considering whether the

1 postpetition earnings exception applies, we first determine
2 whether any postpetition services are necessary to obtain the
3 payments at issue. In re Jess, 169 F.3d at 1208 (citing Towers
4 v. Wu (In re Wu), 173 B.R. 411, 414-15 (9th Cir. BAP 1994)
5 (citing In re Ryerson, 739 F.2d at 1426)). "If not, the
6 payments are entirely 'rooted in the pre-bankruptcy past' and
7 the payments will be included in the estate." Id. at 1208; see
8 also Tully v Taxel (In re Tully), 202 B.R. 481, 483 (9th Cir.
9 BAP 1996) (citing Segal, 382 U.S. at 380). "[W]here the debtor
10 receives a commission post-petition but essentially fulfilled
11 all of his obligations for that commission pre-petition, the
12 commission will be deemed property of the estate." In re Tully,
13 202 B.R. at 483.

14 Given this background, in determining whether the
15 commissions at issue here should be included in Debtors' estate,
16 the touchstone is the Supreme Court's decision in Segal. There,
17 the Supreme Court confronted the question whether the estate or
18 the debtors owned a loss carryback tax refund claim arising from
19 losses generated during the year of the bankruptcy filing. The
20 Supreme Court determined that the refund claim was estate
21 property based on its conclusion that the claim was
22 "sufficiently rooted in the pre-bankruptcy past and [was] little
23 entangled with the bankrupts' ability to make an unencumbered
24 fresh start." 382 U.S. at 380. "The Code follows Segal insofar
25 as it includes after-acquired-property 'sufficiently rooted in
26 the prebankruptcy past' but eliminates the requirement that it
27 not be entangled with the debtor's ability to make a fresh
28 start." Johnson v. Taxel (In re Johnson), 178 B.R. 216, 218

1 (9th Cir. BAP 1995) (quoting In re Ryerson, 739 F.2d at 1426).
2 Therefore, the test for purposes of deciding whether a
3 postpetition payment on a prepetition contract is excluded from
4 property of the estate under the earnings exception is whether
5 the payment is "sufficiently rooted in the pre-bankruptcy past"
6 so as to be included in the bankruptcy estate.

7 **B. Analysis**

8 Debtors base their right to the commissions on two legal
9 theories. First, they contend that, under Idaho law, their
10 commissions were not earned until the purchaser completed the
11 transaction by closing title. And this did not happen until
12 after their petition was filed. Implicitly, they suggest that
13 they had no legal or equitable interests in the commissions on
14 the Petition Date and that the timing of the closing was
15 dispositive.

16 Second, they argue that the bankruptcy court erred by
17 disregarding Debtors' business agreement with Keller and with
18 Debtors' corporation Bastille. Debtors maintain that the real
19 estate sales contracts were property of Keller and not Debtors
20 individually. When the transactions closed, Keller was paid the
21 commission in question. Keller, in turn, paid Bastille,
22 Debtors' corporation, and Debtors were paid either a salary or a
23 distribution from Bastille. Accordingly, Debtors maintain that
24 by the time they received any portion of the commissions, it
25 constituted postpetition earnings which are not subject to
26 turnover under § 541(a)(6). We are not persuaded by Debtors'
27 arguments.

28 "Property interests are created and defined by state law."

1 Butner v. United States, 440 U.S. 48, 55 (1979). However, what
2 constitutes property of Debtors' bankruptcy estate is not
3 determined by looking solely at Idaho law. Instead, we look at
4 Idaho law to determine when and how Debtors earned the real
5 estate commissions and then apply §§ 541(a)(1) and (a)(6) to
6 determine whether the commissions are estate property.

7 Generally, under Idaho law, a real estate broker is
8 entitled to a commission when he or she (a) produces a purchaser
9 ready, willing, and able to buy on the terms fixed by the owner;
10 (b) the purchaser enters into a binding contract with the owner
11 to do so; and (c) the purchaser completes the transaction by
12 closing the transaction in accordance with the contract terms.

13 Margaret H. Wayne Tr. v. Lipsky, 846 P.2d 904, 911 (Idaho 1993).

14 Debtors' interest in receiving a commission upon the
15 satisfaction of all three prongs set forth in Lipsky is a state
16 law property right. See In re John Chezik Imports, Inc., 195
17 B.R. 417, 420 (Bankr. E.D. Mo. 1996).

18 Whether Debtors' state law property right in the
19 commissions is estate property is answered by the analysis and
20 reasoning set forth in Jess. There, the debtor-attorney argued
21 that because he had no cause of action which would have allowed
22 him to sue his client for any portion of his contingency fee on
23 the petition date, the later-realized contingency fee was not
24 property of the estate. After a hearing before the bankruptcy
25 court, the debtor was ordered to turn over 78% of the fee to the
26 estate, the amount attributable to the attorney-debtor's
27 prepetition performance. The Ninth Circuit affirmed, holding
28 that: "Although [the debtor] may not have been able to sue his

1 client for a portion of his fee at the time he filed his
2 bankruptcy petition, he had an interest in the fee attributable
3 to pre-petition work on the case." 169 F.3d at 1208. This
4 interest, the court stated, was "clearly property of the estate
5 under section 541(a)(1)." Id.

6 Here, like the debtor-attorney in Jess, Debtors entered
7 into the real estate sale contracts prepetition. Under Idaho
8 law, their right to receive the commissions was contingent upon
9 the sales closing. Therefore, on the Petition Date, like
10 Mr. Jess, Debtors had, at least, a contingent interest in the
11 commissions that was attributable to their prepetition work.
12 Id. at 1207-08; see also In re Neuton, 922 F.2d at 1382-83; In
13 re Ryerson, 739 F.2d at 1425-26. This contingent interest which
14 was attributable to their prepetition work is property of their
15 estate under the broad parameters of § 541(a)(1).

16 Unlike Mr. Jess, Debtors presented no evidence at trial
17 that shows they performed services postpetition in connection
18 with the closings. This lack of evidence prevented the
19 bankruptcy court from apportioning the commissions between pre-
20 and postpetition work. Accordingly, the commissions, although
21 received postpetition, were sufficiently rooted in the pre-
22 bankruptcy past as to constitute property of Debtors' estate.

23 Finally, contrary to Debtors' arguments, the bankruptcy
24 court considered Debtors' relationships with Keller and Bastille
25 in deciding whether the commissions were property of Debtors'
26 estate. Under Idaho law, only a licensed real estate broker or
27 salesperson is entitled to collect a real estate commission.
28 Idaho Code § 54-2054. And, under Idaho law, only an individual

1 may hold a real estate license. Idaho Code §§ 54-2004; 54-2002.
2 Melanie testified that the commissions were earned by her and
3 her husband. She also testified that she had never heard of a
4 corporation earning a real estate commission. Her testimony was
5 thus consistent with Idaho law.

6 Because Debtors were the licensed agents, only Debtors
7 could have a legal or equitable interest in the commissions as
8 of the commencement of their case. Bastille legally could not
9 earn the commission. Furthermore, Bastille was not formed when
10 Debtors filed their petition, and property of the estate is
11 determined as of the petition date.

12 In addition, as the bankruptcy court held, Debtors'
13 contract with Keller to have their commissions paid to Bastille
14 does not change the result under § 542(a). Under the statute,
15 Debtors must turn over property in their possession, and **account**
16 **to the trustee**, for any property of the estate. Section 542(a)
17 does not require current possession of the property. Newman v.
18 Schwartzner (In re Newman), 487 B.R. 193, 200 (9th Cir. BAP
19 2013).

20 Debtors also argue that § 542 as applied in this case
21 violates the Thirteenth Amendment's prohibition against
22 involuntary servitude because the statute, in effect, forces
23 Debtors to close the transactions in question for the sole
24 benefit of their creditors after filing for bankruptcy. They
25 further contend that § 542 violates their right to equal
26 protection under the law. These arguments are raised for the
27 first time on appeal. Therefore, we do not address them. See
28 Cold Mountain v. Garber, 375 F.3d 884, 891 (9th Cir. 2004).

VI. CONCLUSION

In sum, for the reasons stated, we AFFIRM. The bankruptcy court properly determined that the \$52,485.92 in real estate commissions paid by Keller to Debtors postpetition constituted property of their estate. Therefore, Debtors are required to turn over the commissions to Trustee under § 542(a).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28