NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 17-3323

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: GEORGE DIB HABER, Debtor.	
CLYDE HARDESTY, Appellant, v. GEORGE DIB HABER, Appellee.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

O R D E R

Before: GUY, MOORE, and GILMAN, Circuit Judges.

Trustee Clyde Hardesty, through counsel, appeals an order of the district court that affirmed an order of the bankruptcy court holding that the proceeds from a post-petition sheriff's sale of the debtor's foreclosed real property was not part of the bankruptcy estate because the trustee had abandoned the property prior to the sheriff's sale. The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

Debtor George Haber previously owned residential real property located at 5317 Agate Place, Lewis Center, Ohio (the "Property"). On February 20, 2014, a state court complaint in foreclosure commenced relating to the Property. On November 3, 2014, the debtor filed a voluntary petition for bankruptcy pursuant to Chapter 13 of the Bankruptcy Code, which was

later converted to a Chapter 7 bankruptcy case. In his bankruptcy schedules, the debtor indicated that the Property was valued at $360,500 and that the outstanding balance of claims secured by the Property was $617,628.

On February 25, 2015, the trustee filed an abandonment of property in which the trustee abandoned the debtor's Property on the ground that there was "no equity in the Property for the benefit of creditors."

On April 15, 2015, the Property was sold at the sheriff's sale, resulting in surplus proceeds of $80,593 (the "Surplus Proceeds"). The Surplus Proceeds resulted from the first mortgage holder's failure to file an answer to the foreclosure complaint in state court, thereby extinguishing the first mortgage holder's lien and precluding it from being paid any proceeds. The bankruptcy court then entered the discharge of the debtor and the bankruptcy case was closed.

On July 13, 2015, the state court granted the trustee's motion to intervene in the foreclosure proceeding for the purpose of asserting a claim to the Surplus Proceeds. In doing so, the state court ordered that the Surplus Proceeds be distributed to the trustee. The state court order also denied the debtor's homestead exemption claim on the ground that it was untimely.

Meanwhile, the trustee had moved to reopen the bankruptcy case in an attempt to administer the Surplus Proceeds, arguing that the proceeds were part of the bankruptcy estate because the debtor had not listed the Surplus Proceeds in his schedules. The debtor objected on the ground that the trustee had abandoned the Surplus Proceeds pursuant to the abandonment of property that the trustee filed in February 2015, prior to the foreclosure sale. The bankruptcy court overruled the debtor's objection and reopened the case.

The debtor then filed an amended Schedule C to claim a homestead exemption in the Property (and, thus, the Surplus Proceeds) pursuant to Ohio Revised Code § 2329.66(A)(1). Over the trustee's objections to the amended claim of exemption, the bankruptcy court allowed the homestead exemption and determined that the trustee had abandoned the Property, which therefore meant that the Surplus Proceeds were not part of the bankruptcy estate. The bankruptcy court noted that the debtor, in his original and amended schedules, properly disclosed

the Property, the Property's value, and the amount of claims secured against the Property. The debtor therefore did not, the bankruptcy court concluded, conceal the Property from the trustee.

The bankruptcy court also rejected the trustee's argument that the debtor had a continuing duty to supplement his schedules to identify the Surplus Proceeds, reasoning that the Bankruptcy Code and Rules require a debtor to correct any information in the debtor's schedules only if the debtor learns that his or her schedules were inaccurate "*as of the petition date.*" The debtor's schedules here were not inaccurate as of the petition date because the Surplus Proceeds did not exist on that date, the bankruptcy court added.

Finally, the bankruptcy court rejected the trustee's argument that, because the state court order directed the Surplus Proceeds to be distributed to the trustee, res judicata required that the trustee receive the proceeds. The state court order did not indicate that the Surplus Proceeds were property of the bankruptcy estate. Thus, the bankruptcy court determined that the state court had not made a "final determination" that the Surplus Proceeds were part of the estate for purposes of res judicata. Moreover, because it had exclusive jurisdiction to determine what is property of the bankruptcy estate, 28 U.S.C. § 1334, the bankruptcy court concluded that the state court had no jurisdiction to order that the Surplus Proceeds be part of the bankruptcy estate, even if the state court had made that finding.

The district court affirmed the judgment of the bankruptcy court, reasoning that the trustee had abandoned the Property and thus had abandoned any claim to the Surplus Proceeds that arose out of the Property.

The trustee now appeals the district court's judgment. The trustee argues that there was no abandonment of the Property and, therefore, the Surplus Proceeds belong to the bankruptcy estate. He also argues that the proceeds constitute personal, not real, property and are part of the estate because they were "never scheduled or disclosed" by the debtor.

On appeal from a judgment of the bankruptcy court, a district court reviews the bankruptcy court's findings of fact for clear error and its conclusions of law de novo. *See Rembert v. AT & T Universal Card Servs., Inc.* (*In re Rembert*), 141 F.3d 277, 280 (6th Cir. 1998); *Nicholson v. Isaacman* (*In re Isaacman*), 26 F.3d 629, 631 (6th Cir. 1994). If the district

court's decision is then appealed to this court, we consider the judgment of the bankruptcy court directly, using the same standards of review as the district court. *See Isaacman*, 26 F.3d at 631.

The Bankruptcy Code provides that "all legal or equitable interests of the debtor in property as of the commencement of the case" belong to the bankruptcy estate. 11 U.S.C. § 541(a)(1). The trustee, however, "may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate." 11 U.S.C. § 554(a). "[O]nce abandoned, property passes out of the estate. The trustee . . . may not reassert control over the property in light of subsequent events . . . ." *Kloian v. Kelley* (*In re Kloian*), 115 F. App'x 768, 769 (6th Cir. 2004). However, "[w]hen an asset is not disclosed in the schedule of assets, the abandonment is revocable." *Id.*

The trustee's argument that he never abandoned the Surplus Proceeds and thus is entitled to claim them hinges on his notion that the Surplus Proceeds are part of the bankruptcy estate. This notion is incorrect. The trustee abandoned the Property, which had the effect of removing the Property from the bankruptcy estate, *see id.*, and causing it to revert to the debtor. *See Bittel v. Yamato Int'l Corp.*, No. 94-1396, 1995 WL 699672, at *5 (6th Cir. Nov. 27, 1995); *see also Kane v. Nat'l Union Fire Ins. Co.*, 535 F.3d 380, 385 (5th Cir. 2008) ("Property abandoned under [§] 554 reverts to the debtor, and the debtor's rights to the property are treated as if no bankruptcy petition was filed." (quoting 5 Collier on Bankruptcy § 554.02[3])). The Surplus Proceeds arose out of the foreclosure sale of the Property—which belonged to the debtor and not the estate—and thus the Surplus Proceeds fall outside of the estate and outside of the trustee's ability to claim them.

Ample case law supports this conclusion. For instance, in *Russell v. Tadlock* (*In re Tadlock*), 338 B.R. 436 (B.A.P. 10th Cir. 2006), the Bankruptcy Panel for the Tenth Circuit held that the bankruptcy court erred in revoking the trustee's abandonment of real property and declaring that the surplus proceeds from a sale of the real property were part of the bankruptcy estate. The debtors had filed their bankruptcy petition and indicated that their home was encumbered by liens that exceeded the home's value by $99,000. *Id.* at 437. The bankruptcy case closed, which effectively resulted in an abandonment of the home by the trustee. *Id.*; *see* 11

U.S.C. § 554(c). At the subsequent foreclosure sale, the home sold for more than the liens against it. *Tadlock*, 338 B.R. at 437. The bankruptcy court ruled that the trustee's abandonment should be revoked and that the surplus proceeds were part of the estate. *Id.* at 438. The appellate panel reversed, reasoning that "abandonment is irrevocable, even if it is subsequently discovered that the abandoned property had greater value than previously believed," and finding that none of the exceptions to the irrevocability of abandonment applied. *Id.* at 439 (quoting *Vasquez v. Adair* (*In re Adair*), 253 B.R. 85, 88 (B.A.P. 9th Cir. 2000)). The appellate panel therefore remanded the case and ordered the bankruptcy court to pay the surplus proceeds to the debtor. *Id.* at 440.

A bankruptcy court held similarly in *In re Sutton*, 10 B.R. 737 (Bankr. E.D. Va. 1981). There, the trustee abandoned the debtor's home after determining that the home had little or no equity for the benefit of the estate. *Id.* at 738. The home was then sold in a foreclosure sale, yielding $6,800 in surplus proceeds. *Id.* at 739. The bankruptcy court denied the trustee's request to revoke the abandonment and rejected the trustee's argument that revocation was warranted because, at the time he filed his abandonment of property, he was unaware that the property would yield surplus proceeds. *Id.* at 738-39. The bankruptcy court noted that the debtor properly disclosed the home on his schedule and concluded that, once a scheduled asset of the estate has been abandoned by the trustee, it is no longer part of the estate and thus is beyond the control of the trustee. *Id.* at 739-41. The surplus proceeds therefore were released to the debtor. *Id.* at 741.[1]

[1] Other cases are in accord. *See, e.g.*, *Murray v. Nagy* (*In re Nagy*), 432 B.R. 564, 568-69 (Bankr. M.D. La. 2010) (dismissing the trustee's complaint for the debtor to turn over surplus proceeds from the post-petition sale of the debtor's home on the ground that the trustee had abandoned the property and thus the surplus proceeds from the sale of the property were not part of the bankruptcy estate because "[t]he home and its sale proceeds . . . reverted to the debtors" when the trustee abandoned the property upon the closing of the bankruptcy case); *In re Bast*, 366 B.R. 237, 239-40 (Bankr. S.D. Fla. 2007) (holding that the surplus proceeds from a post-petition foreclosure sale of real property that was "heavily encumbered" when the debtors filed their petition, and which was abandoned by the trustee, belonged to the debtors and noting that the surplus proceeds "had been abandoned" and "no longer consititute[d] property of the estate" when the trustee abandoned the real property).

The trustee cites no authority that would compel a different conclusion. Indeed, none of the cases cited by the trustee are analogous or applicable to this case. For example, two cases that the trustee primarily relies upon involved surplus proceeds from foreclosure sales that existed *prior* to the filing of the debtors' petitions but that the debtors failed to disclose on their schedules. *See Slone v. Anderson* (*In re Anderson*), 511 B.R. 481 (B.A.P. 6th Cir. 2013); *Silver v. Munson*, (*In re Wieder*), No. 12-50353, 2013 WL 3336611 (Bankr. S.D. Ind. July 2, 2013). They have no application in the instant case, which involves surplus proceeds from a *post-petition* foreclosure sale. The trustee's tax refund analogy is similarly unavailing. The trustee relies upon a case in which the surplus funds received by the debtors from their tax refunds after their bankruptcy case closed was found to be property of the estate because the debtors failed to disclose the tax refunds in their schedules. *See In re Medley*, 29 B.R. 84, 85-87 (M.D. Tenn. 1983). Here, however, the debtor disclosed the Property in his schedules.

We also reject the trustee's argument that the debtor had duties to include the Surplus Proceeds as potential assets in his original schedules and to amend his schedules to identify the Surplus Proceeds. The trustee cites no authority for the proposition that a debtor, upon filing a bankruptcy petition, must schedule assets of which he has no knowledge, which are not in existence, and which may never come into existence. The Bankruptcy Code and Rules require only that "the schedules contain information that is accurate *as of the date the petition is filed.*" *Adair*, 253 B.R. at 91 (emphasis added). Here, the debtor's original schedules disclosed all of his then-current assets, including the Property, and thus contained accurate information. The debtor testified that he had no knowledge of the Surplus Proceeds until after the foreclosure sale and thus the debtor did not have a duty to schedule future, unknown assets that were not yet in existence. *See, e.g.*, *Cusano v. Klein*, 264 F.3d 936, 947 (9th Cir. 2001) ("[A] debtor has no duty to schedule a[n] [asset] that did not [exist] prior to bankruptcy."); *Hutchins v. IRS*, 67 F.3d 40, 43-44 (3d Cir. 1995) (holding that debtor had no duty to schedule an asset that did not exist until after bankruptcy, but arose later from another asset that the debtor had scheduled).

Nor did the debtor have a duty to supplement his schedules. A debtor must amend his schedules only in limited circumstances; that is, when the debtor "acquires or becomes entitled to

acquire" any interest in property within 180 days of the filing of the petition pursuant to 11 U.S.C. § 541(a)(5). Fed. R. Bankr. P. 1007(h). Section 541(a)(5) makes clear, however, that the debtor need amend his schedules only when the interest in property that he acquired after filing a petition "would have been property of the estate." 11 U.S.C. § 541(a)(5). As set forth above, the trustee had abandoned the Property—and thus the resulting Surplus Proceeds—before the debtor acquired the Surplus Proceeds. The Surplus Proceeds, therefore, were not considered "property of the estate," *id.*, and the debtor had no duty to supplement his schedules to disclose the Surplus Proceeds that properly belonged to him.

The trustee's argument that the Surplus Proceeds constitute after-acquired property that belong to the estate also lacks merit. Section 541(a)(6) provides that the estate includes after-acquired "[p]roceeds . . . of or from property of the estate." 11 U.S.C. § 541(a)(6). Here, however, the Surplus Proceeds are not "of or from property of the estate"; rather, by virtue of the trustee's prior abandonment of the Property, the Surplus Proceeds are of or from the debtor's own property. Likewise, § 541(a)(7) provides that "any interest in property that the estate acquires after the commencement of the case" is property of the estate. 11 U.S.C. § 541(a)(7). A plain reading of this provision makes clear that an interest in property that was not created with or by the property of the estate does not constitute property of the estate. *See TMT Procurement Corp. v. Vantage Drilling Co.* (*In re TMT Procurement Corp.*), 764 F.3d 512, 524-25 (5th Cir. 2014). The Surplus Proceeds here were created with or by the Property, but the Property at that time was no longer property of the estate. Thus they do not qualify as after-acquired property of the estate.

The trustee also argues that "by the Debtor claiming an exemption in the Surplus Proceeds, the Debtor was conceding that the Proceeds were property of the Bankruptcy Estate." This argument ignores the debtor's statement in his homestead exemption filing that "he is not waiving his dispute that the property is no longer property of the estate on account of having been abandoned by the trustee." The trustee's argument does nothing to alter the conclusion, set forth above, that neither the Property nor the Surplus Proceeds are part of the bankruptcy estate.

Finally, the trustee did not challenge the bankruptcy court's conclusion that res judicata did not apply and that, therefore, the state court's order directing the Surplus Proceeds to be distributed to the trustee was not binding on the bankruptcy court. The trustee therefore has waived any res judicata argument. *See Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 311 (6th Cir. 2005) ("[F]ailure to raise an argument in [an] appellate brief constitutes a waiver of the argument on appeal.").

Accordingly, we **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk