

Chapter 7 Trustee's *Ex Parte* Request to Use U.S. Marshall to Search Debtor's Home for Undisclosed Assets Complies with the Fourth Amendment

Written by: Christine H. Black

Robinson Brog Leinwand Greene Genovese & Gluck P.C.; New York
chb@robinsonbrog.com

A debtor's overall deceitfulness and disdain for the judicial process during her divorce proceeding created the factual predicate for what the bankruptcy court described as extraordinary relief. Not only did the bankruptcy court grant an *ex parte* application to employ the U.S. Marshall's Service to conduct a search of the debtor's home and to seize undisclosed estate property, but it also denied the debtor's Fourth Amendment challenge to the propriety of the search and seizure.

In *Youngman v. Bursztyn (In re Miriam R. Bursztyn)*, a case of first impression, the New Jersey Bankruptcy Court held that, subject to the limitations of the Fourth Amendment, the chapter 7 trustee's use of a search and seizure order was a proper method for locating undisclosed estate assets, that the search and seizure complied with the limitations of the Fourth Amendment and the evidence seized would not be suppressed because it was not obtained in a criminal prosecution.

According to the *Bursztyn* decision, during the debtor's divorce proceeding the trial court found there was no factual basis supporting a sale or transfer of the assets and the appellate division concluded that Miriam Bursztyn was lying about the whereabouts of fine jewelry and artwork and still possessed the assets that the trial court estimated had a value of \$125,000. Approximately three months after the appellate court's decision, Bursztyn filed her chapter 7 petition. Absent from her schedule B was any fine jewelry and artwork. Her statement of affairs failed to disclose that she had transferred the fine jewelry and artwork.

The chapter 7 trustee commenced an adversary proceeding—filed under seal—seeking the return of the assets, an injunction directing the return of assets and a denial of the debtor's discharge. Simultaneously, the trustee moved *ex parte* under seal, listing the jewelry set forth in the state court decisions and seeking an order under §105 authorizing the trustee and the U.S. Marshall to search the debtor's home and seize the property.

The trustee relied on the findings of the appellate division, the family court and the trustee's own investigation to support the *ex parte* request. The complaint pled the debtor's repeated and unjustified refusals during the divorce proceedings to turn the jewelry and artwork over for appraisal despite numerous court orders, her frequent violation of the discovery orders, her disregard for the judicial process and with respect to her bankruptcy schedules, the omission of the assets and the failure to disclose that the assets had been transferred. In support of its request for a preliminary injunction under §105, the trustee argued that the debtor's willingness to conceal assets in contravention and disregard of court orders, the clear and present danger of the dissipation of the assets given their size and the attendant harm to the bankruptcy estate constituted the requisite cause.

The court granted the trustee's request for a search and seizure order *ex parte* and on March 14, 2006, the U.S. Marshall, the trustee's counsel and an appraiser arrived at the debtor's home. During the search, the debtor repeatedly denied that she had the jewelry, but a search of the debtor's closet proved otherwise. Found inside a fanny pack was a key that opened a lock box containing the jewelry; additional pieces were discovered in a laundry sack. Coincidentally, the jewelry found during the search was the same jewelry the state court concluded the debtor possessed, the trustee named in its application and the debtor denied having. The artwork was found in the house and was photographed. The appraiser's report to the trustee was 18 pages long, listed 189 pieces of fine jewelry and 10 works of art, all of which the appraiser determined had a forced sale value of \$242,767. Subsequently, the debtor sought to suppress the evidence asserting that the search violated her Fourth Amendment rights.

In ruling on the debtor's request, the bankruptcy court addressed several questions: did the trustee have the authority to seek a search and seizure order in furtherance of its statutory duties; did the Fourth Amendment apply to such a search and seizure; if yes, was the search and seizure conducted within the Fourth Amendment's constraints and should the evidence found be suppressed and returned to the debtor? The bankruptcy court answered the first three questions in the affirmative and the last in the negative.

Relying upon §704 of the Bankruptcy Code, the court concluded that the trustee has a statutory duty to collect estate assets and that the use of a search and seizure order was an appropriate method to do so. Because the Fourth Amendment applies only to governmental action, after focusing on the function of a trustee and drawing heavily on the reasoning of *Taunt v. Barman* (*In re Barman*), 252 B.R. 403 (Bankr. E.D. Mich. 2000), the only other case that addressed the issues, the *Bursztyn* court held that the trustee's status and function created a sufficient nexus of governmental action requiring compliance with the Fourth Amendment.

Next, the bankruptcy court focused on the search to determine whether or not it was reasonable. That is, in the context of the pending case, was there an appropriate balance between the debtor's expectation of privacy in her home and the competing interest of assuring the proper administration of the bankruptcy case? Finding that the debtor's privacy interest gave way when she sought bankruptcy protection, the bankruptcy court found a substantial factual basis upon which to conclude that the search and seizure was appropriate and necessary within the context of the case.

Finally, the bankruptcy court denied the debtor's request to suppress the evidence. Not only was the use of a search and seizure order proper to locate estate assets, but the search itself was properly conducted within the constraints of the Fourth Amendment. Additionally, because the exclusionary rule applies only in criminal proceedings, it was inapplicable to suppress evidence in this civil action.

The bankruptcy court credited the trustee's careful pleading as being vital to the success of the request. The trustee assembled the facts and presented specific, concrete and compelling reasons to justify the procedure—including the history of the state court proceeding, a recitation of the items sought and an explanation of the potential risk of loss and harm to the estate. The

bankruptcy court noted that the search was conducted in an appropriate manner and that the order's procedural requirements, such as notifying the debtor's counsel upon execution of the search order, were complied with. Conversely, while not cited by the bankruptcy court, the trustee avoided pleading any criminality. Consequently, the argument that the search and seizure violated Federal Rule of Criminal Procedure 41 was disposed of in footnote, noting that Rule 41 was inapplicable to a civil search and seizure order by a bankruptcy trustee. Similarly, the request to suppress the evidence was denied because the exclusionary rule applies only in a criminal proceeding.

The bankruptcy court cautioned that use of a search and seizure order should be reserved for those rare situations where there exists a compelling need. Nevertheless, counsel should be cognizant that when properly sought, pre-petition conduct could be the basis for some extraordinary relief.