Chapter 13
Office of the Chapter 13 Trustee—Akron Office
Keith L. Rucinski—Trustee

CHAPTER 13 QUARTERLY NEWSLETTER
DECEMBER 2021

1. SEASONS GREETINGS AND BEST WISHES FOR THE NEW YEAR

During the year 2021, the country and the local community struggled to return to a sense of normal by making adjustments to work and personal schedules due to ongoing COVID-19.

Despite the continued challenges of working remotely and conducting court hearings and 341 meetings by telephone or video methods, the bankruptcy community continued to rise to the challenge and help those in need of bankruptcy relief an opportunity to save their home and pursue a fresh financial start.

Here is to hoping that 2022 will allow us to return to a full sense of normal and be able to meet in person in the next several months.

The Chapter 13 office wishes everyone a safe and healthy new year.

To allow the Chapter 13 staff to spend time with their families please note that the Chapter 13 office will be closed on December 23, 24, 27, and 31.

2. TIME IS RUNNING OUT TO MODIFY PLANS TO 84 MONTHS

One of the items of the CARES Act was to allow modification of Chapter 13 plans so that the plan duration may extend to 84 months. This provision is effective for plans which were confirmed as of March 27, 2021. Please note that this extension will expire on March 27, 2022.

Many counsel have amended plans for their clients to resolve feasibility issues and to address post-petition debt. However, the opportunity to do so is coming to an end and there is no indication that Congress will provide another extension beyond the March 27, 2022 deadline.

The 84-month plan duration can be very beneficial to debtors in allowing them additional time to catch up plan payment delinquencies and be successful in their Chapter 13 plan. However, counsel should consider the following when extending the plan up to 84 months:

A. The request to extend the plan duration up to 84 months must be by motion. It is a motion to modify the plan (not an extension). The CARES Act legislation specifically says that plans may be modified; and therefore, counsel must file a motion to modify the plan.

B. To allow proper service and notice, the motion must be served on all applicable parties.

C. As with all plan modifications, amended schedules I and J must be filed with the Court.

D. As with all plan modifications, appropriate tax returns, paystubs, and other financial information must be submitted to the Chapter 13 office for review.

E. The motion must specifically state how the debtor's finances have been affected by Covid-19 and give details. Please note that the reasons to extend based on Covid-19 can include but are not limited to the following:

    i. The debtor had reduced income over the last year and a half due to Covid-19.
    ii. Someone in the debtor's household has had reduced income due to Covid-19 over the last year and a half.
    iii. Either the debtor or someone in the household has health issues related to Covid-19 (and explain how it impacted finances – inability to work, costs of medical treatment, etc.)
    iv. Due to Covid-19, the debtor's finances have been limited and the debtor has not been able to pay routine living expenses such as utility bills, groceries, etc.

F. Please note that the plan is modified "up to 84 months". This allows the Chapter 13 office to adjust the plan as it may take less than the full 84 months to complete. This language should be included in both the motion and the order.

G. If the motion and order state that the plan is modified "to 84 months", the plan is locked to the full 84 months and the debtor may end paying more to creditors than the debtor is required.

H. The motion and order must state the amount of the plan payment.

I. The motion and order must allow the Trustee to adjust the dividend based on the debtor's applicable commitment period.

The financial reasons on how someone can be affected by Covid can be very broad but they must be specifically stated in the pleadings. To simply say that the debtor has been affected by Covid-19 is not sufficient and will delay approval of the needed modification.

Some motions to modify the plan duration up to 84 months have stated that the debtor's plan payment arrearages are current as of the date of the motion. This language is not appropriate. The debtor's plan payment arrearages are not current; the arrearage is being rolled forward up to an 84-month plan duration to allow the debtor to be successful in the

plan. Counsel will run into issues saying “plan payments are current”, especially in cases which require conduit mortgage payments. The plan payment arrearage is being rolled forward to allow the debtor additional time to pay the delinquent payments.

Please note that the Trustee will adjust the unsecured dividend based only on the 36 month and 60-month applicable commitment period for plans extended up to 84 months. Conduit mortgage payments will extend up to 84 months. In rare cases where the debtor may have a financial windfall after extending the plan, the Trustee will move to increase the unsecured dividend through a motion to modify the plan with notice and service to the appropriate parties.

Many plans are being modified to 84 months as appropriate and will help debtors to be successful in a Chapter 13 plan.

3. DEBTOR E-MAILS NEEDED PRIOR TO 341 MEETING

The Trustee asks counsel to make sure to submit the debtor’s e-mail address to the Chapter 13 office prior to the 341 meeting. Having the e-mail allows the Trustee to respond quickly if debtors have questions on how the plan is being administered. Additionally, the e-mail is necessary should the 341 meeting be done by video, the Trustee will need to send both counsel and the debtor the e-mail invite with the zoom link included.

Please find attached to this newsletter a copy of the 341 e-mail form. The Trustee asks the counsel have their clients complete the form and submit the form through the portal to the Chapter 13 Office.

Lastly, please note that one of the most important reasons to supply the Trustee with the debtor’s email is so that the Trustee is able to return funds to the debtors at the conclusion of their case. In many cases, the debtors have moved to a new address during the course of the plan and have not informed the Chapter 13 office (and often their counsel).

4. PLEASE DO NOT TELL DEBTORS THEIR PLAN IS COMPLETE

Recently, some counsel have been advising their clients that their Chapter 13 plan is complete and also instructed them to cease making their monthly payments. Counsel base their assumption on the fact that the applicable time period has elapsed since the filing date and the debtors should be through with their plan.

Although the applicable commitment period is temporal requirement, many debtors do not begin making their payments timely. It is often the second (and in some cases the third) month into the plan before plan payments begin. The temporal requirement requires the debtor to make payments for each month of the applicable commitment period pursuant to 11 USC § 1326.

Generally, the Chapter 13 office does not file motions to dismiss because it may take the debtor a month or two longer to complete payments. In addition, if the debtor had any pay suspensions during the course of the plan, that will extend the duration of the plan. Further, if the debtor failed to make the full plan payment for any month of the applicable commitment period that will also extend the length of the plan.

If counsel are going to advise their clients that their plan is complete, counsel are encouraged to review the plan on the National Data Center and to reconcile the debtor's monthly payments in order to make sure that the debtor is truly complete in their plan.

Please remember, the Chapter 13 office audits all cases when plans near completion, files a necessary stop payment order, and files the request for discharge. In essence, counsel do not need to advise their clients that their plan is complete. That will be done automatically by the Chapter 13 office.

By telling a debtor the plan is complete, when it is not, counsel risk upsetting the debtor and an upset debtor can result in no future referrals for counsel.

5. DIRECT PAYS CAN HURT ATTORNEYS CASHFLOW

Over the past few months, a number of Chapter 13 cases which were filed requested that the debtor be able to make direct payments. Most of these requests have had a routine reason which really was not justified given the facts of the case.

Please remember that for debtors who work a regular W-2 job that employer deductions are required pursuant to Admin Order 17-2. The Chapter 13 office does the employer deduction order when the case is filed so that by the time of the 341 meeting payments have begun and the case can often be scheduled for confirmation. When payments have not be received by the 341 meeting, confirmation can be delayed.

Direct payments are designed for people which are not W-2 employees such as those on retirement income, or social security, or are self-employed.

Please be advised that it is understandable that debtors may not want to have a pay order because they don't want their employer to know about their Chapter 13 plan. However, most debtors work for companies which have other debtors in a Chapter 13 program on wage deduction without incidence. If the debtor wants a direct payment and then does not make those payments, the Chapter 13 office has to do a wage order. This process can take some time which can delay the payment of the attorney fee paid for up to a year, especially if the debtor falls behind in making conduit payments. Conduit payments must be paid before payment of attorney fees.

The Trustee asks that counsel deter their clients from seeking direct payments as in most cases the Trustee will object to said request.

6. CAN PAST RENT BE PART OF THE CHAPTER 13 PLAN?

Historically, past rent has been an unsecured claim in a Chapter 13 plan. Generally, by the time the Chapter 13 is filed, the debtor is no longer living in the location which gave rise to the past due claim for rent. Therefore, the rent is treated as an unsecured claim.

Given the COVID related eviction moratoriums over the last 18 months, many individuals now find themselves delinquent in rent. Counsel have inquired if past due rent can be part of the Chapter 13 plan if it is the debtor's intent to remain living at their current location.

As this is a novel question, the Chapter 13 office can only offer the following thoughts:

a. The Chapter 13 plan must provide for the past due rent to be paid in full, much like a delinquent car lease.
b. The Chapter 13 plan must assume the rental lease contract in section 6 of the plan.
c. Counsel should review 11 USC § 365 to determine whether or not it applies to a Chapter 13 case. It may or may not.
d. Landlords can always object to the Chapter 13 plan on the basis that the debtor did not fulfill their obligations under the rental contract (destroyed the property or caused other damage).

It is the position of the Chapter 13 Trustee to allow past due rent in the Chapter 13 plan, on the above conditions, subject to any objections or concerns parties may raise.

In order for counsel to assist their clients, please find attached a flyer which is a notice from the United States Trustee Program with information on how the debtors can apply for rental assistance.

7. PERSONAL FINANCIAL MANAGEMENT COURSE

The Chapter 13 office will continue to sponsor an on-line Personal Financial Management Course through the Trustee Education Network. Information regarding the online program is available on the Chapter 13 website at www.chapter13info.com. There is no charge to take the course online for Chapter 13 debtors who have filed in Akron, Ohio.

Please note: in a joint case, each debtor must take the on-line course separately and use two different e-mails. The software program generates the required certificates of completion partly based on e-mails to keep track of who has taken the required course.

Please find attached to this newsletter, a flyer for the on-line course that counsel may share with their clients in Chapter 13 cases.

8. DEBTORS IN A MORTGAGE FORBEARANCE PROGRAM WHEN PLAN IS FILED ARE DELINQUENT IN MORTGAGE PAYMENTS AND THE PLAN IS REQUIRED TO BE CONDUIT

Some counsel are not putting conduit mortgage payments inside the Chapter 13 plan as required by Administrative Order 16-1.

Counsel are asserting that the debtor is in a forbearance program; and therefore, are not delinquent. However, the fact that the debtor is in a forbearance program is evidence in and of itself that the debtor is not current in mortgage payments.

To be excused from Administrative Order 16-1, counsel must file a motion and be granted permission by the US Bankruptcy Court.

In general, the Trustee will object to these motions as in many cases when the Trustee asks for proof that the debtor is in a forbearance program, no proof could be provided by the debtor.

In cases where debtor is in a forbearance program, the plan should provide for conduit mortgage payments and state the date the mortgage payments are to resume.

9. CREDITOR REQUEST TO APPEAR AT 341 MEETINGS

As 341 meetings will continue to be held virtually for the foreseeable future, more creditors are requesting the opportunity to participate at 341 meetings.

In order to accommodate the parties, the Trustee requests that creditors make their request to appear at the 341 meeting no later than 4 PM Tuesday for the Thursday 341 meeting.

Creditors can email their request to aroyer@ch13akron.com.

Effective October 1, 2021, when a creditor makes a request to appear at a 341 meeting, the 341 meeting will be done by Zoom using video. The parties should be aware that as in all 341 meetings, the video will be recorded.

Should a creditor fail to give the two-day notice of a request to appear at the 341 meeting, the Trustee may adjourn the meeting as a one-time courtesy to the creditor.

If the same creditor fails to give the required notice on a regular basis and continues to not give the courtesy of a two-day request, the creditor may lose their opportunity to appear at the 341 meeting.

10. CASE LAW

Duvall v. Ontario County, NY (W.D.N.Y, Case No. 21-06236, November 9, 2021)

The debtor unsuccessfully attempted to set aside foreclosure in state court, but the state appellate court affirmed. While the litigation in state court was pending, the county sold the property to a third party in May 2017. However, title was not transferred while the litigation remained pending.

The debtor filed a chapter 13 petition on March 1, 2019, alongside a plan to pay the real estate taxes in full, together with all unsecured claims. The debtor also commenced an adversary proceeding to avoid the tax foreclosure as a constructive fraudulent transfer.

After the trial, Bankruptcy Judge Paul R. Warren avoided the tax sale as a constructively fraudulent transfer, and the county appealed. Judge Larimer upheld Judge Warren in a November 9 opinion.

Judge Larimer acknowledged the split of authorities. Another district judge in Rochester, District Judge Frank P. Geraci, Jr., had ruled in *Hampton v. County of Ontario*, 588 B.R. 671 (W.D.N.Y. 2018), that BFP v. Resolution Trust, 511 U.S. 531 (1994) did not apply to tax foreclosures. Judge Larimer was persuaded by Judge Geraci's analysis, holding that BFP, does not apply to tax foreclosures. *BFP* held that mortgage foreclosures are immune from fraudulent transfer attack.

Like Judge Geraci, Judge Larimer said that tax foreclosure "was *precisely* the kind of 'draconian' strict foreclosure regime that the Supreme Court had characterized in *BFP* as a relic of the unenlightened past."

Unlike mortgage foreclosures, counties in New York take title in tax foreclosure before a sale and deprive the owner of all equity. In a subsequent sale, there are no bidding rules or procedures to ensure receipt of reasonably equivalent value.

In the case on appeal, Judge Larimer noted that the $22,500 in taxes "bore no resemblance" to the $91,000 value of the property.

In sum, Judge Larimer affirmed Judge Warren by holding that "*BFP*'s holding does not operate to shield the County from the debtor's claim of fraudulent conveyance, in light of the competing interests and the particular forced sale scheme presented here."

On a question where the circuits are split, another district judge in Rochester, N.Y., has held that an *in rem* tax foreclosure of real property can be set aside as a fraudulent transfer for lack of reasonably equivalent value under Section 548(a)(1)(B).

As it now stands, the Third Circuit allows tax foreclosures to be avoided as fraudulent transfers. *See Hackler v. Arianna Holdings Co., LLC*, 938 F.3d 473 (3d Cir. 2019). The

Fifth, Ninth and Tenth Circuits hold to the contrary, having extended *BFP* from mortgage foreclosures to protect tax foreclosures. The most recent of those decisions came from the Ninth Circuit. *See Tracht Gut, LLC v. Los Angeles County Treasurer*, 836 F.3d 1146 (9th Cir. 2016). In the appeal before Judge Larimer, the debtor owed about $22,500 in real estate taxes. More than two years before bankruptcy, the county issued a tax foreclosure petition giving the debtor the ability to redeem the property before a date in January 2017. When the debtor did not redeem, the county obtained a default judgment of foreclosure in March 2017.

SAVE THE DATE

ANNUAL WHITE WILLIAMS SEMINAR
APRIL 1, 2022
HARTVILLE KITCHEN

Personal Financial Management Course

THIS COURSE IS REQUIRED TO EARN YOUR DISCHARGE !

Online Chapter 13 Bankruptcy Course
Finally Financial Freedom!

** The Trustees' Education Network (TEN) – an affiliate of the National Association of Chapter 13 Trustees – has created an online financial management course for the benefit and financial education of Chapter 13 debtors. This course is approved by the United States Trustee Program. **

THIS COURSE IS FREE!

THIS COURSE IS ABLE TO BE COMPLETED PRIOR TO YOUR 341 HEARING WITH THE TRUSTEE*

SIGN UP ONLINE AT WWW.13CLASS.COM

WHAT YOU WILL NEED TO SIGN UP

- Unique Trustee Identifier Number
  - **TEN13010**
- Bankruptcy Case Number
- Your full Name "exactly" as shown on bankruptcy petition
- A valid email address (each debtor will need a separate email address)
- Your bankruptcy Schedules A/B, D, and E/F for Lesson 1 and Schedules I and J for Lesson 3.

You must complete the entire course (all lessons and quizzes) to receive a Certificate of Completion from the Trustees' Education Network. Once you complete all coursework, the Trustees' Education Network will send a Certificate of Completion to you and to your Bankruptcy Court.

***Course satisfies legal requirements for debtors' Certificate of Completion and to gain a discharge of their bankruptcy case.*

**Other course providers may charge you a fee for this course.*

Debtor Email Authorization Form

Email Authorization Form

This form allows the Trustee to communicate with you via e-mail regarding your case.

Debtor Name (Please Print) _____ Chapter 13 Case Number _____

Email Address (Please Print):

_____

Joint Debtor Name (if applicable) (Please Print) _____ Chapter 13 Case Number _____

Email Address (Please Print):

_____

1. I hereby agree to allow the Chapter 13 Trustee's Office to contact me via the above e-mail address instead of sending regular mail for certain notifications (such as annual ledgers) related to my case.
2. I hereby agree to notify the Chapter 13 Trustee's Office if I change my e-mail address that I am using during the pendency of my case.
3. I also understand that certain pleadings and notices will still come by regular U.S. mail to my address as required by the U.S. Bankruptcy Code.

Date _____ Debtor Signature _____

Date _____ Joint Debtor Signature (if applicable) _____

Rental Assistance Flyer

UNITED STATES TRUSTEE PROGRAM INFORMATIONAL NOTICE

EMERGENCY RENTAL ASSISTANCE PROGRAMS

If you are a renter having trouble paying your rent or a landlord who has lost rental income due to challenges presented by the COVID-19 pandemic, help may be available. Through funding from the U.S. Department of the Treasury's Emergency Rental Assistance (ERA) program, there are a wide variety of state and local programs that offer assistance—including financial assistance—to those who are struggling to make ends meet.

Provided below are links to learn more about ERA programs in your local area, including how they work and who is eligible, as well as other important information to help you navigate these difficult times. ERA programs can vary based on locale since flexibility is given to states to develop programs that best suit the needs of their communities.

For more general information on assistance programs, visit: https://www.consumerfinance.gov/coronavirus/mortgage-and-housing-assistance/

For ERA program links in your local area, visit: https://www.consumerfinance.gov/coronavirus/mortgage-and-housing-assistance/renter-protections/find-help-with-rent-and-utilities/

To get answers to frequently asked questions, visit:

For Renters: https://www.consumerfinance.gov/coronavirus/mortgage-and-housing-assistance/renter-protections/emergency-rental-assistance-for-renters/

For Landlords: https://www.consumerfinance.gov/coronavirus/mortgage-and-housing-assistance/help-for-landlords/

To talk with a no-cost Department of Housing and Urban Development-approved housing counselor who can help you understand your options, make an action plan, and even help you apply for rental assistance, call (800) 569-4287 or visit https://www.consumerfinance.gov/find-a-housing-counselor/.

September 2021

Duvall v. Ontario County, NY (W.D.N.Y, Case No. 21-06236, November 9, 2021)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CORI DUVALL,

Debtor-Plaintiff,

v.

COUNTY OF ONTARIO, NEW YORK,
JOHN DOE, JANE DOE,

Defendants-Appellants.

DECISION AND ORDER

21-CV-6236L

INTRODUCTION

Appellants the County of Ontario, New York (the "County"), and John Doe and Jane Doe (the "Doe appellants"), appeal from an order of the United States Bankruptcy Court for the Western District of New York ("Bankruptcy Court"), dated February 18, 2020, following a bench trial, which granted a petition by appellee Cori DuVall (the "debtor") to avoid a transfer of real property under 11 U.S.C. §§522(h) and 548(a)(1)(B). *DuVall v. County of Ontario*, 2021 Bankr. LEXIS 369 (W.D.N.Y. Bankr. 2021). (Dkt. #1-2).

Appellants also appeal from another order of the Bankruptcy Court, dated September 29, 2020, which had denied the County's *in limine* motion to offer evidence at trial concerning the value of an annuity held by the debtor. (Dkt. #1-1).

For the reasons set forth below, the decisions appealed from are affirmed, and the appeal is dismissed.

FACTUAL BACKGROUND

This matter arises from the *in rem* tax foreclosure of real property situated at 9097 County Road 14 in the town of West Bloomfield, Ontario County, New York (the "Property"), for taxes arising on and after January 1, 2015. The Property consists of a 49-acre farm and residence, which was deeded to the debtor by her mother on December 29, 2014.

In October 2016, the County issued a tax foreclosure petition and statutory foreclosure notices, advising that interested parties had the right to redeem the Property by payment of unpaid tax liens, interest, and penalties, on or before January 13, 2017.

Debtor did not redeem the Property or answer the foreclosure petition, and a default judgment of foreclosure on the Property was entered on March 7, 2017. The debtor filed an application to vacate the foreclosure in May 2017, which was denied by the Ontario County Supreme Court in June 2017. The debtor appealed, and in February 2019, the Appellate Division, Fourth Department, affirmed the foreclosure. In the meantime, the Property had been sold to the Doe appellants at auction on May 17, 2017. However, title was not actually transferred to the Doe appellants: the transfer was deferred pending final legal resolution of the matter.

The debtor filed a Chapter 13 bankruptcy petition on or about March 1, 2019, and submitted a Chapter 13 plan on March 13, 2019. Her filings disclosed that she was the beneficiary of an annuity (the "Annuity") from a settlement with the State of New York, with an "unknown" total value, and identified the Annuity as exempt property pursuant to Section 522(d)(11)(E) of the Bankruptcy Code ("Section 522"), which exempts settlements compensating for the loss of future earnings. The debtor's Chapter 13 plan specified that the County's tax liens would be paid in full, as well as all claims by unsecured creditors. It also indicated the debtor's intent to bring an adversary proceeding to challenge the County's tax foreclosure of the Property as a "fraudulent

conveyance" under 11 U.S.C. §548(a)(2)(B) ("Section 548"). The County was served with copies of the filings and plan on March 14, 2019. (Dkt. #1-1 at 3).

The debtor commenced the underlying proceeding on April 25, 2019, and the County was served with the Summons and Complaint on May 3, 2019. The County did not object to the exemptions claimed by the debtor, or request any extension of time to do so.

The parties engaged in discovery, including disclosures relative to the Annuity, and the County ultimately retained a valuation expert to calculate its value as of the foreclosure date. The debtor objected to the County's attempt to offer evidence challenging the exempt status of the Annuity, as the County had failed to make any objection to it within the thirty-day limitation period established by Fed. R. Bank. Proc. 4003(b) ("Rule 4003").

The County moved *in limine* to admit valuation evidence as part of the Bankruptcy Court's insolvency analysis, and on September 29, 2020, the Bankruptcy Court issued a Decision and Order barring the admission of valuation evidence for the Annuity, due to the County's failure to timely object to the debtor's claim of exemption. (Dkt. #1-1).

The matter was tried in November 2020, and on February 18, 2021, the Bankruptcy Court issued a Decision and Order voiding the *in rem* tax foreclosure of the Property as a constructively fraudulent conveyance under Section 548(a)(2)(B). *DuVall*, 2021 Bankr. LEXIS 369, Dkt. #1-2.

This appeal, of both the September 29, 2020 and February 18, 2021 decisions by the Bankruptcy Court, followed.

DISCUSSION

I. Standard of Review

Pursuant to 28 U.S.C. §158, "the district courts of the United States . . . have jurisdiction to hear appeals . . . from final judgments, orders, and decrees" of a Bankruptcy Court judge. 28 U.S.C. §158(a)(1). In assessing the Bankruptcy Court's conclusions of law, a *de novo* standard is applied. In reviewing the Bankruptcy Court's conclusions of fact, the Court is not authorized to engage in independent factfinding, and reviews the Bankruptcy Court's determinations only for clear error. *See Morgan v. Gordon*, 450 B.R. 402 (W.D.N.Y. 2011).

II. The Bankruptcy Court's Ruling Barring Evidence of Annuity Value

Initially, the County argues that the Bankruptcy Court erred when it barred the County from introducing evidence concerning the value of the Annuity.

To demonstrate that a transfer is constructively fraudulent under Section 548, a plaintiff must show that they were already insolvent, or were rendered insolvent, on the date of the transfer, and that they received less than reasonably equivalent value for their property.

Insolvency is defined as the value of an individual's property, minus property that can be exempted under Section 522(b). Section 522 provides that "[t]he debtor shall file a list of property that the debtor claims as exempt [and u]nless a party in interest objects, property claimed as exempt on such list *is exempt*." Section 522(l)(emphasis added). The debtor, in her bankruptcy filings, designated the Annuity as exempt property under Section 522(d)(11)(E), which exempts settlements compensating for future lost earnings. The County made no objection, nor did it request additional time to file objections.

The Bankruptcy Court held that because the County had failed to timely object to the debtor's March 2019 designation of the Annuity as exempt, or to request an extension of time to

do so, the County was barred from thereafter attempting to argue or prove that the Annuity should not have been exempted. The County argues that this was erroneous, and suggests that the Bankruptcy Court, in assessing the debtor's solvency as of the foreclosure date, was required by overarching "principles of equity" to independently examine whether the Annuity was, in fact, properly exempt. In so arguing, the County asks the Court to follow and apply the holding in *Wisotzke v. County of Ontario,* 2011 Bankr. LEXIS 321 (Bankr. W.D.N.Y. 2011).

In *Wisotzke*, the Bankruptcy Court held that regardless of whether an exemption had been properly claimed or timely objected-to by a party in interest, the "plain language" of Section 522(h), which permits avoidance of the transfer of property that a debtor "could have exempted," suggested that it was necessary for the Court to make its own determination of whether the exemption was proper, and thus, whether the debtor had standing to bring an adversary proceeding. *Id*.[1]

The Court declines to follow *Wisotzke*, noting, as the Bankruptcy Court did in this matter, that the *Wisotzke* court did not mention or consider the effect of Rule 4003 in its decision, or the import of the County's failure to timely object to the exemption, and overlooked controlling Supreme Court precedent. In *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992), the Supreme Court unequivocally held that the validity of an exemption cannot be challenged after the expiration of the 30-day period prescribed by Rule 4003, even if the debtor had no "colorable statutory basis for claiming it." *Taylor*, 503 U.S. 638 at 643.

Taylor's holding remains the governing authority on this issue, and has been subsequently recognized and applied in this Circuit. *See State Bank of India v. Chalasani*, 92 F.3d 1300, 1310

[1] The Court observes, as did the Bankruptcy Court, that in the "[now 10] years since the *Wisotzke* court issued its decision, not a single court has cited it with approval." In fact, the only court that has cited it declined to follow it. *See In re Cutignola*, 450 B.R. 445, 449 (Bank. S.D.N.Y 2011).

(2d Cir. 1996) (citing *Taylor*, wherein "the Supreme Court has held that no exception to the 30-day deadline [for objecting to claims of exemptions under Bankr. R. 4003] could be implied," even where it may "lead to harsh results," and extending the application of *Taylor*'s holding to the 60-day timeline for objections by creditors under Bankr. R. 4004); *GMAC Mortg., LLC v. Orcutt*, 506 B.R. 52, 61 n.5 (D. Vt. 2014)(noting that "[u]nder Rule 4003(b), a party must file an objection [to exemption designations] with a certain time period, or is otherwise barred from 'challenging the validity of the exemption' thereafter") (quoting *Taylor*, 503 U.S. 638 at 642).

While the Supreme Court noted that demanding strict compliance with the deadlines of Rule 4003 "may lead to unwelcome results," it was necessary in order to "prompt parties to act and . . . produce finality." *Id*., 503 U.S. 63 at 644. Thus, while the County's tardiness in attempting to object to the exemption of the Annuity precluded it from offering proof on the matter at trial, the compelling interests of judicial efficiency and finality require that the validity of the exemption cannot be challenged – directly or indirectly – after the expiration of the statutorily-prescribed deadline. The County's failure to object was its own doing, and there are consequences for that neglect.

Exempt property is excluded from an insolvency analysis pursuant to 11 U.S.C. §101(32)(A)(ii), and as discussed above, the County's failure to object to the exemption of the Property meant that the property "[wa]s exempt" by operation of Section 522(l). The Bankruptcy Court's September 29, 2020 Decision and Order denying the County's *in limine* motion is accordingly affirmed.

III. The Bankruptcy Court's Decision Declining To Extend *BFP v. Resolution Trust* To *In Rem* Tax Foreclosures

The County also argues that the Bankruptcy Court erred by declining to extend the holding of *BFP v. Resolution Trust*, 511 U.S. 531 (1994), a mortgage foreclosure action, to the instant *in rem* tax foreclosure proceeding.

BFP held that a mortgage foreclosure action that has been conducted in accordance with state law is, absent a "clear statutory requirement to the contrary," entitled to a presumption that the debtor had received "reasonably equivalent value" for their property under Section 548. In so holding, the Supreme Court emphasized the need to respect a state's authority to carry out its own foreclosure laws and regulations. *Id.,* 511 U.S. 531 at 539.

Courts examining the question of whether to extend *BFP* from mortgage foreclosure actions to *in rem* tax foreclosure proceedings have reached divergent conclusions. Some, including this Court, have found that *BFP* does not deprive an *in rem* tax foreclosure debtor of standing to bring an avoidance proceeding, where the legal protections cited by the Supreme Court as the underpinning for *BFP*, which tend to ensure the debtor's receipt of a more reasonably equivalent value under forced-sale circumstances, are absent from the applicable state law foreclosure scheme. *See Hampton v. County of Ontario*, 588 B.R. 671 (W.D.N.Y. 2018)(Geraci, J.)(*BFP* does not deprive an *in rem* tax foreclosure debtor of standing to bring an avoidance proceeding, because New York's *in rem* tax foreclosure scheme lacks the modern legal protections that tend to ensure the receipt of a more reasonably equivalent value under forced-sale circumstances, such as those cited in justification of the *BFP* holding).[2] *See also Hackler v. Arianna Holdings Co., LLC*, 938 F.3d 473, 479-80 (3rd Cir. 2019)(declining to extend *BFP* to New Jersey tax foreclosures,

[2] The Bankruptcy Court's final decision in *Hampton,* and its final decision in another matter presenting identical questions of law, *Gunsalus v. Ontario County*, were consolidated for purposes of an appeal to the Second Circuit. The appeal is not scheduled to be argued until December 2021. *See e.g.*, Second Cir. 20-CV-3865, Dkt. #60.

collecting cases, and observing that whether a state's tax sale procedures offer sufficient protections to encourage the debtor's receipt of "reasonably equivalent value" is largely determinative of whether *BFP* can be applied); *Yourelo Your Full-Service Relocation Corp. v. City of Revere*, 2020 Bank. LEXIS 3287 at *13, *18-*19 (Mass. Bankr. 2020) (declining to extend *BFP* to tax foreclosure proceedings, noting that "[c]ourts extending the reasoning of *BFP* to strict foreclosure of tax liens have relied on the existence of appropriate procedural safeguards ensuing due process," and finding that "the procedural due process protections afforded the taxpayer by the Massachusetts strict foreclosure statute [are insufficient to] immunize the City from . . . fraudulent conveyance claims").

In contrast, other courts have opted to extend *BFP* to *in rem* foreclosures regardless of whether the applicable state law operated to ensure the receipt of a more reasonable equivalent value, finding that "*BFP[] . . .* eschewed any consideration of the substantive value received in a forced-sale context and instead pinned the validity of the transfer [solely] on whether the forced sale was non-collusive and conducted in compliance with state law." *T.F. Stone Co. v. Harper*, 72 F.3d 466, 470 (5th Cir. 1995). *See also Kojima v. Grandote Int'l,* LLC, 252 F.3d 1146, 1151-52 (10th Cir. 2001); *Tracht Gut, LLC v. Los Angeles County Treasurer*, 836 F.3d 1146, 1154 (9th Cir. 2016).

Here, the Bankruptcy Court determined that *BFP* should not be extended to *in rem* tax foreclosure proceedings, adopting the reasoning set forth in *Hampton.* 588 B.R. 671 at 675. In *Hampton*, which involved two prior *in rem* tax foreclosures by the County, the Court rejected the County's attempt to extend the holding of *BFP*. The Court observed that the Supreme Court's holding in *BFP* was preceded by, and hinged upon, a discussion of the ways in which the protections afforded to homeowners under modern mortgage foreclosure laws work together to

avoid the "draconian consequences" of outdated strict foreclosure schemes. These include notice to defaulting borrowers, significant time allowances before the commencement of foreclosure proceedings, public notice of the sale, and strict adherence to set bidding rules and auction procedures. *Hampton*, 588 B.R. 671 at 675 (citing *BFP*, 511 U.S. 531 at 542). Indeed, the Supreme Court had explicitly limited its holding in *BFP* to "mortgage foreclosures of real estate," on the grounds that "considerations bearing upon other foreclosures and forced sales *(to satisfy tax liens, for example*) may be different." *BFP*, 511 U.S. 531 at 537 n.3 (emphasis added).

In *Hampton*, the Court found that in contrast to the modern and borrower-protective mortgage foreclosure laws touted in *BFP*, New York's Real Property Tax Law ("RPTL") was *precisely* the kind of "draconian" strict foreclosure regime that the Supreme Court had characterized in *BFP* as a relic of the unenlightened past. For example, the RPTL "does not provide for a *pre-seizure* auction whereby the debtor may recover equity," and does not prescribe a competitive bidding process, or otherwise allow market forces to generate a reasonably equivalent value. *Hampton*, 588 B.R. 671 at 676 (emphasis in original).

Here, as in *Hampton*, the County took title to the Property prior to any sale, and because the debtor thereby lost all equity in the Property, no bidding rules or procedures, even if followed, could possibly have inured to the benefit of the debtor or to any creditor other than the County, let alone ensured that the debtor received reasonably equivalent value. Unlike the forced sale in *BFP* to foreclose on a real property mortgage, the amount owed in this matter for property taxes ($22,434.40) bore no rational relationship to the value of the subject Property (which, assuming *arguendo* that the auction price is remotely suggestive of fair market value, is no less than $91,000), and the proceeds of the forced sale would result in a substantial windfall to the County, at the expense of all other creditors.

The Court finds the Bankruptcy Court's reasoning in this matter, and the Court's analysis in *Hampton*, to be persuasive. "Ultimately, state interests must be balanced against [the Bankruptcy Code's] strong policy favoring equal treatment of creditors.'" *Hampton*, 588 B.R. 671 at 677-78 (quoting *In re McMahon*, 129 F.3d 93, 97 (2d Cir. 1997)). Moreover, the "broader purposes of the Bankruptcy Code and its fraudulent transfer provisions [are] to ensure both a fair distribution of the debtor's assets among creditors *and a fresh start for the debtor*," aims that are better served where, as here, the debtor is permitted to retain their exempt equity, while repaying the County and other creditors. *Hampton v. DuVall*, 2020 Bankr. LEXIS 447 at *20-*21 (W.D.N.Y. Bankr. 2020)(determining, on remand, that the subject transfer should be set aside as a fraudulent conveyance)(quoting *In re Smith*, 811 F.3d 228, 238 (7th Cir. 2016)).

The Court thus finds that *BFP*'s holding does not operate to shield the County from the debtor's claim of fraudulent conveyance, in light of the competing interests and the particular forced sale scheme presented here. The Bankruptcy Court's holding to that effect is affirmed.

IV. The Bankruptcy Court's Finding As To The Debtor's Standing

The Bankruptcy Code provides that a Chapter 13 debtor, "may avoid a transfer of property . . . to the extent that the debtor could have exempted such property. . ." Section 522(h).

The County argues that Section 522(c)(2)(B), which holds that property exempted under Section 522 remains liable for "a tax lien, notice of which is properly filed," bars the debtor from setting aside the transfer of the Property as a fraudulent conveyance under Section 548. However, as the Bankruptcy Court found, the plain language of "Section 522(c)(2)(B) [does not] bar[the debtor] from claiming [an] exemption": it "merely provides that exempt property remains liable for a tax lien." *DuVall*, 2021 Bankr. LEXIS 369 at *8.

The Court concurs, and declines to follow the case law from other jurisdictions that has been cited by the County in support of a contrary result (Dkt. #6 at 41-42), none of which is authoritative in this Circuit. The Court also observes that setting aside the transfer of the Property does not prevent the County from collecting on the lien: the debtor has not attempted to use Section 522 to avoid the tax lien itself, but only the transfer of the Property. The debtor's Chapter 13 plan continues to hold her liable for the tax lien, and provides for its payment in full.

V. The Appropriate Remedy

Finally, the County argues that the debtor's damages should be limited to the amount of claims made by other creditors, or alternatively to the amount of her claimed exemption, rather than an avoidance of the tax foreclosure. Specifically, the County argues that the purpose of avoidance actions is to benefit other creditors, and that avoidance should not be permitted if the benefit will inure primarily to the debtor, and permit the debtor to reap a windfall.

This argument was not raised before, or decided by, the Bankruptcy Court, and as such, it is not properly before this Court.

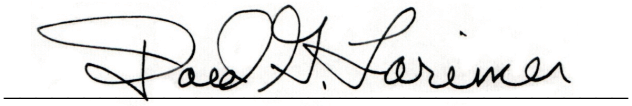
Assuming *arguendo* that this argument was properly before the Court, I find no clear error in the Bankruptcy Court's determination that avoidance of the transfer under Section 522, and the restoration of title to the Property to the debtor, is a proper remedy which would "greatly increase the probability of a successful reorganization under the Chapter 13 plan." *DuVall*, 2021 Bank. LEXIS 369 at *15.

I have considered the remainder of the County's arguments, and find them to be without merit.

CONCLUSION

For the foregoing reasons, the decisions appealed from (Dkt. #1-1, #1-2) are affirmed, and this appeal is dismissed in its entirety, with prejudice. The Clerk is directed to close the case.

IT IS SO ORDERED.



DAVID G. LARIMER
United States District Judge

Dated: Rochester, New York
November 9, 2021.