IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

IN RE:	)	
	)	
MICHAEL DALE ELMORE and	)	Case No. 20-20229
LYNN WHITE ELMORE,	)	
Debtors.	)	

ORDER DENYING MOTION FOR TURNOVER

The debtors filed this chapter 13 bankruptcy case with $8,023.04 in nonexempt funds in the bank. The chapter 13 trustee then filed a motion to compel debtors to turn over those funds (*see* doc. 18). The debtors filed an opposition to the motion (*see* doc. 25) and the trustee filed a reply (*see* doc. 27). The court held a hearing on the motion on December 18, 2020. Having now carefully considered the parties' arguments and the relevant law, and for the reasons discussed in more detail below, the court denies the motion.

Everyone agrees that the nonexempt funds are property of the debtors' bankruptcy estate. The trustee argues that the debtors must immediately turn over the funds, while the debtors contend that that they are entitled to remain in possession of the nonexempt funds and account for them through their plan payments.

Two Bankruptcy Code sections are at play here: § 1306(b) and § 1327(b). Under § 1306(b), "[e]xcept as provided in a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate." So in a chapter 13 case, "while the property of the estate remains in the physical possession of the debtor during the pendency of the case pursuant to § 1306(b), the debtor's property is vested in the estate at the commencement of the case." *See In re Sheeley*, No. 08-32316, 2012 WL 8969064, at *6 (Bankr. S.D. Ohio Apr. 2, 2012).

The default rule is that vesting of estate property – but not possession – changes at confirmation.[1] Under § 1327(b), "[e]xcept as provided in the plan or the order confirming the plan, the confirmation of a plan vests all property of the estate in the debtor." The "default rule" of § 1327(b) "revests in debtors all of their property" on confirmation. *See In re McIntosh*, No. 11-03417-7-MAM, 2015 WL 13774756, at *2 (Bankr. S.D. Ala. Jan. 27, 2015) (Mahoney, J.). Some courts have held that under the default rule, a postpetition creditor can attempt postconfirmation collection without violating the automatic stay because no property of the estate is involved. *See, e.g.*, *In re Jones*, 420 B.R. 506, 515 (B.A.P. 9th Cir. 2009). However, this district's required chapter 13 plan form reverses § 1327(b)'s default rule:

> **12.1 Property of the estate**
>
> Property of the bankruptcy estate shall not vest in the debtor(s) until discharge or dismissal of the case. Notwithstanding the foregoing, any claims or causes of action which have not been liquidated and collected by the trustee by the time of discharge remain property of the estate pending further order of the court.[2]

The district has "elected to use this approach 'to extend the protection of the automatic stay to debtors throughout the life of the chapter 13 case.' This plan alternative is allowed under the Bankruptcy Code because [§] 1327(b) specifically says that the default rule applies 'except as otherwise provided by the plan.'" *See In re McIntosh*, 2015 WL 13774756, at *2 (internal citation omitted).

The trustee's reliance on section 12.1 to argue for immediate turnover of the nonexempt funds conflates "vesting" with "possession." "[P]ossession of estate property and vesting of rights in property are two entirely different concepts." *See In re McConnell*, 390 B.R. 170, 177 (Bankr. W.D.

[1] The plan in this case has not been confirmed, but the court is ruling on the issues raised by the trustee's motion now because the court does not want to delay confirmation of this case.

[2] The debtors originally filed their chapter 13 plan using an outdated version of the plan form that contained different but similar language in section 12.1. They filed an amended plan using the correct plan form. The court's analysis remains the same under either plan form.

Pa. 2008); *see also In re York*, 291 B.R. 806, 815 (Bankr. E.D. Tenn. 2003) ("[T]he vesting of property in the bankruptcy estate does not necessarily determine who has control of the property. Possession, control (including the right to use), and vesting are different concepts."). "Vest" must mean "more than obtaining possession of estate property because [§] 1306(b) already provides that debtors remain in possession of all estate property. Otherwise, 'vests' as used in [§] 1327(b) is superfluous." *See In re Jones*, 420 B.R. at 515. "'[V]ests' means absolute ownership, not mere possession." *See id.*; *see also In re McIntosh*, 2015 WL 13774756, at *2 (property "'vested' in the estate . . . means that the estate is 'invested with the full title to the property'") (citation, quotation marks, and brackets omitted).

Indeed, a primary difference between chapter 13 and chapter 7 "is that the [chapter 13] debtor can retain his property while making regular payments to his creditors . . . ." *See In re Goodrich*, 257 B.R. 101, 103 (Bankr. M.D. Fla. 2000); *see also In re Diaz Esteras*, No. 11-01141 (ESL), 2011 WL 5953483, at *4 (Bankr. D.P.R. Nov. 22, 2011) ("'the right to remain in possession of all property of the estate is a major advantage of chapter 13 debtors who would be required to turn over nonexempt property to the trustee in a chapter 7 case'") (citation omitted). "It is clear from a textual standpoint that under [c]hapter 13 . . . the debtor retains possession of property of the estate even though the language of the confirmed plan indicates that the property of the estate vests with the trustee." *See In re McConnell*, 390 B.R. at 177 (citing 11 U.S.C. § 1306(b)).

Accordingly, a plan that withholds vesting of property of the estate in the debtor until dismissal or discharge does not mean that the trustee automatically has the right to possess estate property. The district form plan addresses vesting but not possession and does not alter the default provision of § 1306(b) that the debtor remains in possession of all estate property. *See, e.g.*, *id.* The debtors here are thus entitled to retain possession under § 1306(b), although "the property of the estate remain[s] legally vested in the bankruptcy estate and continues to remain property of the

estate" until discharge or dismissal. *See In re Sheeley*, 2012 WL 8969064, at *6; *see also In re McConnell*, 390 B.R. at 177.

The second sentence of plan section 12.1 does not apply to liquidated assets such as the bank funds at issue. One of the requirements for confirmation of a chapter 13 plan is that the unsecured creditors must receive at least as much as they would if the case were a chapter 7 liquidation. *See* 11 U.S.C. § 1325(a)(4). Because unliquidated causes of action (for example, personal injury claims) have not been included in calculating the plan payment under § 1325(a)(4), the second sentence of section 12.1 ensures that those unliquidated assets remain property of the estate for eventual distribution to unsecured creditors. But liquidated assets like the bank funds here are already factored into calculating plan payments and are not governed by that sentence.

The court therefore denies the trustee's motion for turnover seeking immediate possession of the nonexempt funds. This does not mean that the trustee has no interest in the funds. The funds are still a factor in the confirmation requirements of Code § 1325, including the liquidation analysis of § 1325(a)(4), just like nonexempt equity in a home or vehicle. And the trustee is not without remedies. The trustee can oppose a motion to modify if the debtors want a reduction in payments or the percentage paid to unsecured creditors. He can request an injunction against refiling if the debtors move to voluntarily dismiss the case. But in the meantime the debtors are entitled to possession of the nonexempt bank funds pursuant to Code § 1306(b) and the district form plan.

Dated: December 30, 2020

HENRY A. CALLAWAY
CHIEF U.S. BANKRUPTCY JUDGE