

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

In re:

JAMES A. NELSON and JANEAN B.
NELSON,

Debtors.

Case No. DK 06-06751
Chapter 7
Hon. Scott W. Dales

ORDER REGARDING APPLICATION FOR RELEASE OF UNCLAIMED FUNDS

PRESENT: HONORABLE SCOTT W. DALES
United States Bankruptcy Judge

This matter is before the court on the Application for Release of Unclaimed Funds (DN 124, the “Application”) filed by eCAST Settlement Corporation, as assignee of Household Retail Services (“eCAST”), pursuant to 28 U.S.C. § 2042. For the following reasons, the court will deny the Application without prejudice.¹

After endeavoring for several years to fulfill their obligations under their confirmed Chapter 13 Plan (DN 11, as amended, the “Plan”), Debtors James and Janean Nelson (the “Debtors”) were no longer able to comply with the Plan, so they filed their Notice of Conversion of Case to Chapter 7 Under Section 1307(a) (DN 109). In obedience to her duties as the Debtors’ former Chapter 13 Trustee, Mary K. Viegelahn (“Chapter 13 Trustee”) filed her final report and account (DN 119), together with a Notice of Unclaimed Funds (DN 122), in the amount of \$8,561.37 (the “Funds”). *See* 11 U.S.C. § 348(e) (terminating Chapter 13 Trustee’s appointment upon conversion); *id.* § 347(a) (procedure for unclaimed property); Fed. R. Bankr. P. 1019(5)(B)(ii) (final report). Upon receiving the final report, eCAST filed the Application claiming the Funds as payment under the Plan for a claim secured by a 2005 Yamaha Motorcycle (the “Motorcycle”).

With respect to unclaimed funds, such as the Funds at issue in the Application, the court typically decides such applications *ex parte*, insisting that a claimant make a clear showing of entitlement to relief as rightful owner. *See* 28 U.S.C. §§ 2041-2042. As the United States Bankruptcy Court for the Northern District of Georgia has explained,

¹ The court has jurisdiction over this case pursuant to 28 U.S.C. §§ 157(a) and 1334(a), and the automatic referral of cases from the United States District Court pursuant to LCivR. 83.2(a). The court’s decision regarding the Application arises in a “core proceeding” within the meaning of 28 U.S.C. § 157(b)(2)(A) & (O).

A creditor applying for unclaimed funds must affirmatively show that it has a “present entitlement to the unclaimed funds sought.” *In re Acker*, 275 B.R. 143, 145 (Bankr. D.D.C. 2002). A creditor does not have the required present entitlement if its claim has been paid, if there is no enforceable claim after foreclosure of its collateral, or if the debtor has brought the obligation current such that no payment is currently due. Thus, an applicant seeking unclaimed funds due to distributions that were made on account of a secured claim must show that the debt has not been satisfied (through payment or foreclosure) and that an amount is currently due and payable to which the unclaimed funds may lawfully be applied.

In re Scott, 346 B.R. 557, 559 (Bankr. N.D.Ga. 2006). The *Scott* court insisted upon strict compliance because any order disposing of funds necessarily implicates due process principles. *Id.* at 558.

In its Application, eCAST admits that it did not file a proof of claim, although the Plan itself contemplates that the Debtors or their son will be making payments through the Chapter 13 Trustee’s office on account of the Motorcycle payment. The Application, however, offers no details regarding payments the Debtors’ son or others may have made on account of the Motorcycle; or whether the Debtors have refinanced the Motorcycle and remitted payments; or whether eCAST or its predecessor otherwise realized value on account of the Motorcycle. In addition, because the court has made no findings that the Debtors converted their case in bad faith, it is conceivable that the Funds were not included within the property of the estate as of the conversion date, and remained property of the Debtors or their son. *See* 11 U.S.C. § 348(f). The court is not resolving these issues, but raising them only to show that the Application does not establish a clear entitlement to the relief requested.

Accordingly, for these reasons and those set forth in *In re Scott, supra*, the court will deny the Application without prejudice. If eCAST renews its Application, it shall serve the parties designated in the last paragraph of this Order.

NOW, THEREFORE, IT IS HEREBY ORDERED that the Application (DN 124) is DENIED without prejudice.

IT IS FURTHER ORDERED that the Clerk shall serve this Order pursuant to Rule 9022 LBR 5005-4 upon Kellie C. Arman Schone, Esq., Mary K. Viegelahn, Esq., Thomas R. Tibble, James and Janean Nelson, R. Todd Redmond, Esq., and the Office of the United States Trustee.

IT IS SO ORDERED.




 Scott W. Dales
 United States Bankruptcy Judge

Dated: April 28, 2010