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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

In re:)	BAP No. NV-12-1439-JuKiD
)	
EUGENE SCOTT NEWMAN, JR.,)	Bk. No. 11-28663-LBR
)	
Debtor.)	
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EUGENE SCOTT NEWMAN, JR.,)	
)	
Appellant,)	
)	
v.)	O P I N I O N
)	
LENARD SCHWARTZER, Chapter 7)	
Trustee,)	
)	
Appellee.)	
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Argued and Submitted on January 25, 2013
at Las Vegas, Nevada

Filed - February 4, 2013

Appeal from the United States Bankruptcy Court
for the District of Nevada

Honorable Linda B. Riegler, Bankruptcy Judge, Presiding

Appearances: Malik W. Ahmad, Esq., Law Office of Malik W. Ahmad, appeared for appellant Eugene Scott Newman, Jr.; Lenard E. Schwartzler, chapter 7 trustee appeared pro se

Before: JURY, KIRSCHER, and DUNN Bankruptcy Judges.

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1 JURY, Bankruptcy Judge:

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3 Chapter 7¹ debtor Eugene Scott Newman, Jr., appeals the
4 bankruptcy court's order granting the motion to compel turnover
5 of debtor's 2011 tax refund in the amount of \$4,727 brought by
6 chapter 7 trustee Lenard Schwartz. We AFFIRM.

7 **I. FACTS**

8 Debtor and his spouse are married and residents of Nevada.
9 On December 2, 2011, debtor filed his individual chapter 7
10 petition. Debtor's schedules did not list his 2011 tax refund
11 as an asset nor did he claim any portion of the refund exempt.

12 In January 2012, debtor made three amendments to his
13 Schedules B and C which related to vehicles.

14 On March 12, 2012, debtor received his discharge.²

15 On May 1, 2012, the trustee sent debtor a letter requesting
16 a copy of his 2011 tax return. Debtor complied. The jointly
17 filed tax return showed a refund of \$5,135 due.

18 On May 11, 2012, the trustee sent debtor a second letter
19 stating that a portion of the refund, in the sum of \$4,727,
20 constituted property of the estate under § 541 and thus was
21 subject to turnover under § 542(a). The letter further stated

22
23 ¹ Unless otherwise indicated, all chapter and section
24 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
25 "Rule" references are to the Federal Rules of Bankruptcy
26 Procedure and "Civil Rule" references are to the Federal Rules
27 of Civil Procedure.

28 ² We take judicial notice of the docket of the underlying
bankruptcy case and the imaged documents attached thereto. See
O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887
F.2d 955, 957-58 (9th Cir. 1989).

1 that debtor could claim an exemption for the earned income
2 credit if debtor filed an amended Schedule C.

3 On May 22, 2012, debtor's counsel sent an email to the Help
4 Desk at the bankruptcy court stating:

5 I have the following cases to reopen for changes in
6 the schedules³. . . . Do I need to pay the reopening
7 case fee of \$269 in each case. These folks have been
8 discharged. The procedural question is if the fee is
9 payable after discharge or after the closure of the
10 case. As usual thanks for your help.

11 On May 23, 2012, the Help Desk responded: "Yes, the
12 reopening fee needs to be paid in each case with that motion.
13 Thank you."

14 On May 30, 2012, debtor's counsel filed an ex parte motion
15 to reopen debtor's case even though debtor's case was not
16 closed.

17 On July 9, 2012, the trustee moved for an order compelling
18 turnover of the 2011 tax refund in the amount of \$4,727 and for
19 sanctions of \$250 (Turnover Motion).

20 On July 16, 2012, debtor's counsel filed an opposition to
21 the Turnover Motion arguing: (1) the tax refund of the non-
22 debtor spouse was not property of the estate subject to
23 turnover; (2) the non-debtor spouse need not turn over her
24 portion of the refund due to the application of the Withholding
25 Rule, the Proportionate Income Rule, or the 50/50 Refund Rule;⁴

26 ³ Counsel listed debtor's case as well as Case No. 09-
27 32838.

28 ⁴ These rules reflect three approaches that various
bankruptcy courts have taken in allocating tax refunds between
the debtor and non-debtor spouse. See In re Spina, 416 B.R. 92,
(continued...)

1 (3) allocation of a joint tax refund is predicated upon
2 consideration of many factors; and (4) the trustee's motion to
3 compel was "too late" because debtor and his spouse spent the
4 money to pay utility bills, their mortgage and other
5 expenditures.

6 On August 9, 2012, the bankruptcy court heard the matter
7 and granted the trustee's Turnover Motion by order entered
8 August 19, 2012.⁵

9 On August 22, 2012, debtor amended his Schedule C to claim
10 the sum of \$3,094 exempt under Nev. Rev. Stat. 21.090⁶, the

11
12 ⁴(...continued)
13 96-97 (Bankr. E.D.N.Y. 2009). The Withholding Rule "allocates
14 the joint tax refund between the spouses in proportion to their
15 respective tax withholding." Id. at 96. Under this rule, a
16 nondebtor spouse may have been employed but not have generated
17 any withheld taxes, and, therefore, would have no right to any
18 withheld taxes which are repaid to the taxpayer. Id. The
19 Proportionate Income Rule allocates the tax refund as a direct
20 percentage of the earnings of the spouses. Id. The 50/50
21 Refund Rule, a minority view which applies New York matrimonial
22 law, creates a rebuttable presumption that each spouse
23 contributed equally to the household, including nonmonetary
24 contributions, and, therefore, the refund should be divided
25 equally between the spouses. Id. at 96-97. See also In re
26 Palmer, 449 B.R. 621 (Bankr. D. Mont. 2011) (adopting formula
27 used by Internal Revenue Service to allocate tax refund).

28 ⁵ Debtor has provided no transcripts in the record on
appeal.

⁶ This section provides:

1. The following property is exempt from execution,
except as otherwise specifically provided in this
section or required by federal law:

- . . .
- (aa) Any tax refund received by the judgment debtor
that is derived from the earned income credit

(continued...)

1 earned income exemption statute, and to claim an additional
2 \$1000 exempt under Nev. Rev. Stat. 21.090(1)(z), the wildcard
3 exemption. Debtor's amended Schedule C does not identify the
4 property to which the exemption applies, but we presume it is
5 the tax refund at issue in this appeal.

6 On August 22, 2012, the same date the amended Schedule C
7 was filed, debtor filed a timely notice of appeal.

8 **II. JURISDICTION**

9 The bankruptcy court had jurisdiction over this proceeding
10 under 28 U.S.C. §§ 1334 and 157(b)(2)(A), (B) and (E). We have
11 jurisdiction under 28 U.S.C. § 158.

12 **III. ISSUE**

13 Whether the bankruptcy court erred in entering the turnover
14 order.

15 **IV. STANDARD OF REVIEW**

16 Whether property is included in a bankruptcy estate and
17 procedures for recovering estate property are questions of law
18 that we review de novo. White v. Brown (In re White), 389 B.R.
19 693, 698 (9th Cir. BAP 2008).

20 **V. DISCUSSION**

21 **A. Debtor Did Not Exempt Any Portion of the Tax Refund Before 22 the Bankruptcy Court Ruled**

23 Debtor first contends that the bankruptcy court erred as a
24 matter of law in holding that debtor's earned income credit of
25

26 ⁶(...continued)
27 described in section 32 of the Internal Revenue Code,
28 26 U.S.C. § 32, or a similar credit provided pursuant
to a state law.

1 \$3,094 is not exempted under Nev. Rev. Stat. 21.090. This
2 contention is erroneous.

3 Debtor's earned income credit exemption was not listed in
4 his original Schedule B or C, nor did debtor amend his Schedules
5 to claim the exemption in the tax refund prior to the bankruptcy
6 court's ruling on the trustee's Turnover Motion.⁷ It was only
7 after the bankruptcy court entered an order in favor of the
8 trustee on the Turnover Motion that debtor filed his amended
9 Schedule C and, even then, his amended Schedule does not
10 identify the property to which the exemption applies.⁸ Because
11 debtor's amended Schedule C was not before the bankruptcy court
12 with respect to the order on appeal, we do not consider it now.
13 Oyama v. Sheehan (In re Sheehan), 253 F.3d 507, 512 n.5 (9th
14 Cir. 2001) ("Evidence that was not before the [trial] court will

15 _____
16 ⁷ We are aware that the purported reason for the delay in
17 amending Schedule C was debtor's attorney's mistaken belief that
18 before amending the Schedule, it was first necessary to obtain a
19 court order reopening debtor's case even though the case had not
20 yet been closed. As a result of his mistaken belief, debtor's
21 attorney claims that the amended Schedule C should be considered
22 on the basis of excusable neglect. However, once the bankruptcy
23 court entered the order granting the trustee's Turnover Motion,
24 debtor's remedy was to file a motion under Civil Rule 59, as
25 incorporated by Rule 9023, or file a motion under Civil Rule
26 60(b), as incorporated by Rule 9024. Debtor did neither and
27 from what we can tell, debtor's attorney now raises the issue of
28 his excusable neglect for the first time in this appeal. We
address this argument in further detail below.

⁸ Under Rule 1009(a), a debtor may amend his schedules as a
matter of course at any time prior to the closing of the case.
Generally, "[t]he bankruptcy court has no discretion to disallow
amended exemptions, unless the amendment has been made in bad
faith or prejudices third parties." Arnold v. Gill (In re
Arnold), 252 B.R. 778, 784 (9th Cir. BAP 2000) (citing Martinson
v. Michael (In re Michael), 163 F.3d 526, 529 (9th Cir. 1998)).

1 not generally be considered on appeal.") (citing Karmun v.
2 Comm'r, 749 F.2d 567, 570 (9th Cir. 1984)); see also Kirshner v.
3 Uniden Corp. of Am., 842 F.2d 1074, 1078 (9th Cir. 1988)
4 ("Papers not filed with the [trial] court or admitted into
5 evidence by that court are not part of the clerk's record and
6 cannot be part of the record on appeal."). As it now stands,
7 the order on appeal necessarily subsumes a determination that
8 the tax refund at issue is nonexempt property of the estate.

9 **B. The Tax Refund Was Property of Debtor's Estate**

10 Debtor next challenges the bankruptcy court's conclusion
11 that the entire tax refund was property of his estate. Section
12 541(a)(1) provides that property of the estate includes all
13 legal or equitable interests of the debtor in property as of the
14 commencement of the case. Under § 541(a)(2), the estate also
15 includes "[a]ll interests of the debtor and the debtor's spouse
16 in community property as of the commencement of the case that is
17 . . . under the sole, equal or joint management and control of
18 the debtor." (Emphasis added).

19 "[T]he right to receive a tax refund constitutes an
20 interest in property." Nichols v. Birdsell, 491 F.3d 987, 990
21 (9th Cir. 2007). The nature and extent of the debtor's interest
22 in the tax refund is determined by nonbankruptcy law. Travelers
23 Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co., 549 U.S. 443,
24 451 (2007) (citing Butner v. United States, 440 U.S. 48, 54-55
25 (1979)). Nevada law applies here.

26 Under Nevada law, all property acquired by either spouse
27 during the marriage, with some exceptions not applicable here,
28 is community property. Nev. Rev. Stat. 123.220; see Norwest

1 Fin. v. Lawver, 849 P.2d 324, 326 (Nev. 1993) (wages of either
2 spouse during marriage are considered to be community funds
3 regardless of which spouse earns the greater income or which
4 spouse supports the community). Spouses also have joint control
5 of community property. Either spouse may transfer or encumber
6 community property without the consent of the other subject to
7 several exceptions, which are not relevant here. Nev. Rev.
8 Stat. 123.230; Soper v. Crystal Palace Gambling Hall, Inc. (In
9 re Crystal Palace Gambling Hall, Inc.), 36 B.R. 947, 950 (9th
10 Cir. BAP 1984). Therefore, because the tax refund is community
11 property subject to the joint control of either spouse,
12 § 541(a)(2) "dictates that the entire prorated tax refund is
13 property of [d]ebtor's bankruptcy estate." In re Martell, 349
14 B.R. 233, 236 (Bankr. D. Idaho 2005).⁹ We thus conclude that
15 the bankruptcy court properly found the tax refund was property
16 of debtor's estate subject to turnover.

17 **C. The Bankruptcy Court Properly Ordered Turnover**

18 Having concluded that the tax refund was property of
19 debtor's estate, we next consider whether the trustee may compel
20 turnover of the property from debtor when he has spent the
21 funds. Section 542(a) provides:

22 Except as provided in subsection (c) or (d) of this

24 ⁹ Debtor advocates that instead of applying Nevada's
25 community property law to this case, we should apply what is
26 known as the 50/50 Refund Rule. Debtor provides no cogent
27 reason – other than a favorable outcome for himself and non-
28 debtor spouse – as to why this Panel should adopt a minority
view followed by a handful of bankruptcy courts in New York that
apply New York matrimonial law. Simply put, New York is not a
community property state.

1 section, an entity, other than a custodian, in
2 possession, custody, or control, during the case, of
3 property that the trustee may use, sell, or lease
4 under section 363 of this title, or that the debtor
5 may exempt under section 522 of this title, shall
6 deliver to the trustee, and account for, such property
7 or the value of such property, unless such property is
8 of inconsequential value or benefit to the estate.

9 Relying on Brown v. Pyatt (In re Pyatt), 486 F.3d 423 (8th
10 Cir. 2007), debtor contends that by spending the funds, they are
11 no longer in his "possession, custody or control" within the
12 meaning of § 542(a). In Pyatt, although the debtor had
13 approximately \$1,900 in his bank account at the time his
14 petition was filed, the Eighth Circuit found that he could not
15 be compelled to turn over that amount when most of the funds
16 were used to honor prepetition checks that cleared soon after
17 his bankruptcy filing because the funds were no longer in his
18 possession or control. In reaching this conclusion, the court
19 first reasoned that the language of § 542(a) said nothing about
20 whether the obligation to deliver the property to the trustee
21 continued after custody or control ceased. Id. at 428. Next,
22 citing Maggio v. Zeitz, 333 U.S. 56 (1948), the court observed
23 that pre-Code practice suggested that § 542(a) permitted a
24 trustee to compel turnover only from entities which have control
25 of property of the estate or its proceeds at the time of the
26 turnover demand. Id. at 428-29. The court also rejected the
27 argument that present possession was not required in light of
28 the statutory language that authorized the trustee to demand
turnover of the property, "or its value." According to the
Eighth Circuit, this language meant that if a debtor transferred
property of the estate and received value for it, "a trustee may

1 compel him to turn over the value of the property because he
2 still has control over the proceeds of the property.” Id. at
3 429.

4 Finally, the court expressed concern that if present
5 “possession, custody or control” was not required, the “trustee
6 could proceed both against the debtor and against the payees and
7 obtain double satisfaction.” Id. at 427. The court noted that
8 § 550(d) prohibited double satisfaction in avoidances under
9 §§ 544, 545, 547-549, 553(b), and 724(a) but made no mention of
10 § 542(a). The court reasoned: “The absence of such a
11 prohibition suggests that the drafters did not intend to
12 authorize a trustee to proceed under § 542(a) against everyone
13 who may have had control over property of the estate at some
14 point after the petition was filed.” Id. at 427-28.

15 The Pyatt ruling does not persuade us. Among the Circuit
16 courts and Bankruptcy Appellate Panels that have addressed the
17 issue before us, Pyatt represents a minority view.¹⁰ The Fourth
18 and Seventh Circuits and the Sixth and Tenth Circuit bankruptcy
19 appellate panels do not require the debtor/defendant to have
20 present possession, custody or control of property when a demand
21 for turnover is made. See Beaman v. Vandeventer Black, LLP (In
22 re Shearin), 224 F.3d 353 (4th Cir. 2000) (law firm, having
23 possessed year-end profits belonging to the debtor during the
24 pendency of his bankruptcy case, must turn over profits, or
25 their equivalent value, to the trustee, notwithstanding that the

26
27 ¹⁰ We note that the Nevada District Court has followed Pyatt
28 in Shapiro v. Henson (In re Henson), 449 B.R. 109 (D. Nev.
2011).

1 law firm no longer possessed the funds at the time the turnover
2 proceeding was filed); Boyer v. Carlton, Fields, Ward, Emmanuel,
3 Smith & Cutler, P.A. (In re USA Diversified Prods., Inc.), 100
4 F.3d 53, 56 (7th Cir. 1996) (“[B]y the time the trustee got
5 around to demanding the money from the law firm, the law firm no
6 longer had it, so how could it deliver it to the trustee?
7 [Section 542], however, requires the delivery of the property or
8 the value of the property. Otherwise, upon receiving a demand
9 from the trustee, the possessor of property of the debtor could
10 thwart the demand simply by transferring the property to someone
11 else. That is not what the statute says, . . . and can’t be
12 what it means.”) (emphasis in original); Bailey v. Suhar (In re
13 Bailey), 380 B.R. 486, 491-93 (6th Cir. BAP 2008) (portion of
14 tax refund which was property of the debtor’s estate retained by
15 attorney for unpaid attorney’s fees and no longer in the
16 debtor’s possession was subject to turnover); and Jubber v. Ruiz
17 (In re Ruiz), 455 B.R. 745 (10th Cir. BAP 2011) (requiring
18 turnover of the balance of funds in the debtors’ checking
19 account when petition was filed, prior to payment of checks that
20 debtors had written prepetition).

21 Recently, in the unpublished decision of Rynda v. Thompson
22 (In re Rynda), 2012 WL 603657 (9th Cir. BAP Jan. 30 2012),
23 another Panel of this court held that § 542(a) does not require
24 current possession under circumstances similar to those here.
25 In Rynda, the debtor filed a chapter 7 petition and did not list
26 her entitlement to tax refunds under state and federal law in
27 her Schedule B or claim such refunds exempt in her Schedule C.
28 After learning about the refunds, the trustee made a demand on

1 the debtor to turn over the refunds. In response, the debtor
2 asserted, among other things, that the funds were no longer in
3 her possession – although she offered to make monthly payments
4 to pay the amount of the refunds. The trustee refused her
5 proposal and filed a motion for turnover of the refunds under
6 § 542. After a hearing, the bankruptcy court issued a decision
7 determining that a turnover order was appropriate if a debtor
8 came into possession of estate property after filing a petition,
9 even if the debtor no longer had possession of the property.
10 Id., at *1. The debtor appealed.

11 On appeal, the Panel held that even though debtor no longer
12 possessed the funds, she was not relieved of her statutory
13 obligation “to deliver to the trustee and account for such
14 property’ or its value.” Id., at *2. “Section 542’s mandate
15 means that she must deliver property or pay over money to the
16 trustee. The requirement is not waived because the debtor no
17 longer possesses the property.” Id. (citation omitted). In the
18 end, the Panel held that “since the Debtor had been in
19 possession of property of the estate, the Turnover Order was
20 appropriate even though the Debtor did not possess the funds at
21 the time the Trustee filed the Turnover Motion.” Id., at *3.

22 Because we do not find Rynda distinguishable from this
23 case, we adopt its holding, but expand on its analysis in light
24 of debtor’s reliance on Pyatt. We begin our analysis with the
25 language of § 542(a) itself. United States v. Buckland, 289
26 F.3d 558, 564 (9th Cir. 2002) (en banc). Under the plain
27 language of the statute “[t]he obligation to turnover extends
28 not just to property presently in someone’s possession, custody

1 or control but to property in its 'possession, custody or
2 control during the case.'" Boyer v. Davis (In re USA
3 Diversified Prods., Inc.), 193 B.R. 868, 874-75 (Bankr. N.D.
4 Ind. 1995) (emphasis in original). Here, there is no question
5 that debtor was entitled to the tax refund on the petition date
6 and that he received the refund post-petition. Thus, debtor was
7 in "possession, custody, or control" of the property "during the
8 case" as required under the statute.

9 Moreover, the plain language of the statute provides a
10 broader remedy than turnover of property itself. Section 542(a)
11 provides that "an entity . . . in possession, custody, or
12 control, during the case, . . . shall deliver . . . and account
13 for, such property or the value of such property." (Emphasis
14 added). "[I]f the statute [were] read to require current
15 possession of the property, the language allowing a trustee to
16 alternatively recover 'the value of the property' would become
17 superfluous, as the trustee could only recover the property
18 itself." In re Ruiz, 455 B.R. at 751. The statute should not
19 be interpreted so as to render one part inoperative. Id.

20 In addition, the pre-Code practice of requiring possession
21 must be viewed in context. In Maggio, 333 U.S. 56, the trustee
22 brought a motion to hold Maggio in contempt for failing to turn
23 over property of the estate. "Numerous courts, including
24 Maggio, were troubled by the possibility that a turnover order
25 might be issued against a party who could not possibly comply
26 with it, because the property in question was no longer in its
27 possession, and then attempt to force that party to do the
28 impossible through contempt proceedings." In re USA Diversified

1 Prods., Inc., 193 B.R. at 876. Even then, if the party did not
2 have present possession, it only meant that the trustee could
3 not seek to enforce turnover through contempt, but instead was
4 required to initiate a plenary proceeding in an effort to obtain
5 a money judgment for what the turnover respondent no longer
6 possessed. Id. at 877. Considered in this context, the United
7 States Supreme Court in Maggio "held that turnover was
8 appropriate only 'when the evidence satisfactorily establishes
9 the existence of the property or its proceeds, and possession
10 thereof, by the defendant at the time of the [turnover]
11 proceeding.'" In re Bailey, 380 B.R. at 491 (quoting Maggio,
12 333 U.S. at 63-64). Whatever the procedures then, the plain
13 language of § 542(a) has no "present possession" requirement.

14 We also conclude that the Pyatt court's concern with a
15 trustee's double recovery is unfounded. Section 550(d)'s
16 prohibition on double recovery references statutes that relate
17 to the trustee's avoidance powers (§§ 544, 545, 547-549, 553(b)
18 and 724(a)). Because § 542(a) addresses not avoidance, but
19 turnover of property of the estate, "little, if anything, should
20 be read into the failure to include § 542(a) in the provisions
21 of § 550." In re Ruiz, 455 B.R. at 751-52. Moreover, "if a
22 trustee sought a double recovery, the party from whom the second
23 recovery was sought could raise as an equitable defense to
24 turnover that the bank account constituted effectively a single
25 asset, and the trustee should not be able to recover the same
26 asset twice." Id. at 752.

27 The upshot of this analysis is clear: even though debtor
28 no longer possessed the funds, he was not relieved of his

1 statutory obligation “to deliver to the trustee and account for
2 such property’ or its value.” Rynda, 2012 WL 603657, at *2.
3 Our conclusion is consistent with the Ninth Circuit’s holding in
4 Nichols, 491 F.3d 987. In that case, the issue was whether the
5 debtors’ overpayment of taxes, which entitled them to an
6 immediate refund, was property of their estate subject to
7 turnover. The debtors elected to leave the overpayments on
8 deposit with the United States and the State of Arizona and to
9 apply the overpayments to their future tax liability. Upon
10 discovery, the trustee required debtors to turn over the unpaid
11 balance on their taxes to the estate. The Ninth Circuit held
12 that the right to receive a tax refund constituted an interest
13 in property and, therefore, it followed that the debtors’
14 election to waive the carryback and relinquish the right to a
15 refund necessarily implicated a property interest. The court
16 determined that the debtors had exchanged a right to present
17 property for the right to it later and thus the value of the tax
18 credit was subject to the trustee’s avoidance powers. Thus,
19 even though the funds were not presently in the debtors’
20 possession, the trustee had authority to compel turnover of the
21 value of the tax credit from the debtors. Compare United States
22 v. Gould (In re Gould), 401 B.R. 415 (9th Cir. BAP 2009) (fact
23 that the debtor had spent tax refund which he was not entitled
24 to did not make Internal Revenue Service’s appeal moot because
25 debtor could be ordered to pay back the money), aff’d, 603 F.3d
26 1110 (9th Cir. 2010).

27 In sum, we hold that § 542(a) does not require the debtor
28 to have current possession of the property which is subject to

1 turnover. "If a debtor demonstrates that [he] is not in
2 possession of the property of the estate or its value at the
3 time of the turnover action, the trustee is entitled to recovery
4 of a money judgment for the value of the property of the
5 estate." Rynda, 2012 WL 603657, at *3. In addition, the refund
6 here, approximately \$5,000, cannot be viewed as having an
7 insignificant value to the estate.¹¹ Accordingly, the bankruptcy
8 court properly granted the trustee's Turnover Motion.

9 **D. Civil Rule 60(b) and Excusable Neglect**

10 Debtor's attorney argues on appeal that his failure to file
11 amended Schedule C prior to the hearing on the Turnover Motion
12 constitutes excusable neglect. Civil Rule 60(b)(1) grants
13 bankruptcy courts discretion to relieve a party from a judgment
14 or order for reason of "mistake, inadvertence, surprise, or
15 excusable neglect," provided that the party moves for such
16 relief not more than a year after the judgment was entered.

17 A Civil Rule 60(b) motion must be made in the bankruptcy
18 court. After entry of the order granting the trustee's Turnover
19 Motion, debtor made no such motion for the bankruptcy court to
20 consider. At the hearing on this matter, the Panel urged
21 debtor's counsel to proceed with the filing of a Civil Rule
22 60(b) motion because we generally do not decide issues on appeal
23 that were not first presented to the bankruptcy court. In re
24 E.R. Fegert, Inc., 887 F.2d at 957. Debtor must seek this

25
26 ¹¹ Although debtor contends the amount recovered by the
27 trustee would be inconsequential because he is entitled to
28 claimed exemptions, as previously explained, the issue of
whether he is entitled to any exemption is not properly before
us in this appeal.

1 relief in the bankruptcy court.

2 **VI. CONCLUSION**

3 For the reasons stated, we AFFIRM.

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