

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
 JAMES J. PARKS COMPANY,) CASE NO. BK85-1357
)
 DEBTOR) A86-166
)
 EUGENE C. CHAMBERLAIN, TRUSTEE,)
)
 Plaintiff)
)
 vs.)
)
 J. P. CONSTRUCTION, INC.,)
)
 Defendant)

MEMORANDUM

A hearing on the Motion to Reconsider (Filing #44) was held on September 26, 1988. Appearing on behalf of the movant/defendant was Robert Bothe of McGrath, North, Mullin & Kratz, P.C., Omaha, Nebraska. Appearing on behalf of the plaintiff was Christopher Connolly of Thompson, Crouse, Pieper & Brumbaugh, P.C., Omaha, Nebraska.

The motion to reconsider is sustained. At the time of the transfer, March 6, 1985, debtor owed defendant \$46,731.89. Defendant owed debtor \$88,068. The debts were mutual and under state law defendant did have a right to setoff. Therefore, if the March 6 transaction had not occurred and a Chapter 7 bankruptcy had been filed, defendant would have still had such right of setoff. Under Section 506(a) of Title 11, a right of setoff is treated as a secured claim. Therefore, defendant would have had a secured claim to the extent of the amount owed by debtor. Receipt of such amount on March 6, 1985, did not give defendant more than it would have received under Chapter 7.

Trustee suggests that the existence of the right of setoff would, in itself, be a preference. Trustee's theory is that under 11 U.S.C. § 506(a) a right of setoff is a secured claim. Trustee then argues that such a "secured claim" is a lien or security interest, which can be avoided.

FILED
DISTRICT OF NEBRASKA
AT _____ M
DEC 30 1988
Judith M. Napier
Clerk, U.S. Bankruptcy Court
By _____ Deputy

This Court does not agree. A right of setoff is not a charge against interest in property, which is the definition of "lien" at 11 U.S.C. § 101(33). A setoff is more in the nature of a counterclaim allowing one who owes another to pay only a net amount. The Bankruptcy Code acknowledges the possibility of the right of setoff at 11 U.S.C. § 553 and codifies the treatment of such right at 11 U.S.C. § 506(a) and 11 U.S.C. § 553(a) and (b). Braniff Airways, Inc., v. Exxon Co., U.S.C., 814 F.2d 1030 (5th Cir. 1987); In re Nepsco, Inc., 55 Bankr. 574 (Bankr. D. Maine 1985).

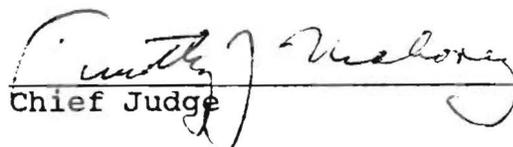
This Court originally relied upon In re McCormick, 2 C.B.C.2d 1145, 5 Bankr. 726 (Bankr. N.D. Ohio 1980). However, a further review of that case and the more recent case cited above leads this Court to believe that a right of setoff, exercised or not, is a defense to a preference action. Therefore, reliance on McCormick is inappropriate.

Therefore, the order dated June 30, 1988, entering judgment against defendant in the amount of \$48,079.39 is withdrawn. Judgment is entered in the amount of \$1,347.50.

Separate journal entry shall be filed.

DATED: December 30, 1988.

BY THE COURT:


Chief Judge