

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

IN RE:

RAYMOND E. NORRIS, et al.,

Debtors.

FARMERS STATE BANK OF
SUPERIOR, NEBRASKA,

Plaintiff,

vs.

RAYMOND E. NORRIS, et al.,

Defendants.

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BK 84-2287

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UNITED STATES DISTRICT COURT, CLERK
FOR THE DISTRICT OF NEBRASKA
OMAHA

CV 86-0-456

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DISTRICT OF NEBRASKA
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By _____ Deputy

MEMORANDUM AND ORDER

This matter is before the Court on appeal from an order of the Bankruptcy Court dated May 27, 1986, dismissing the plaintiff Farmers State Bank of Superior, Nebraska's ("the Bank's") complaint against Raymond E. Norris and Barbara B. Norris, debtors-in-possession and the United States of America. The complaint alleges that the defendants converted the Bank's cash collateral through a post-petition transfer of funds from the debtors to the Internal Revenue Service. The Bankruptcy Court found that the Bank lacked standing to bring the complaint, and ordered it dismissed. Upon review of the issues, the Court finds the decision of the Bankruptcy Court should be reversed.

BACKGROUND

The Norris' are debtors-in-possession in their Chapter 11 reorganization case filed with the Bankruptcy Court on November 21, 1984. This adversary proceeding was filed by the Bank against the Norris' and the United States on September 9, 1985. The Bank

is the holder of an allowed secured claim in excess of \$190,000.00 evidenced by a security agreement and financing statement covering all of the debtors' inventory, accounts receivable and the proceeds thereof. The Bank claims that subsequent to the filing of the Chapter 11 petition, and without authorization by the Bankruptcy Court or permission from the Bank, the debtors transferred cash in the amount of \$10,103.50 to the Internal Revenue Service. The Bank has made demand upon the debtors and the government for return of the funds but both refuse to do so.

In its complaint, the Bank claims that the defendants have engaged in a conversion of the Bank's cash collateral and pray for damages in the amount of the transferred funds. The Bankruptcy Court dismissed the Bank's complaint, characterizing the action as one to avoid a post-petition transfer under 11 U.S.C. § 549(a). Because such an action may be brought only by the trustee or the debtor-in-possession and not by a creditor, the Bankruptcy Court found that the Bank lacked standing to maintain the action. In so holding, however, the Bankruptcy Court expressed regret:

Such a result, although required by the language of the statute, is not equitable. If the allegations of the complaint are accepted as true for the purposes of this motion, then the result of this decision is that a debtor-in-possession can make payments to a governmental agency and pay from cash collateral any obligation to that government agency. This result may be nice for the debtor and the Government, but it certainly does not comport with the overall scheme of the Bankruptcy Code which requires the United States Government and its agencies to recognize and remain subordinate to perfected security interests.

Farmers State Bank v. Norris, No. BK 84-2287, mem. op. at 3
(Bankr. D. Neb. May 27, 1986). This appeal followed.

DISCUSSION

The question before the Court is one of law, and is thus subject to de novo review. Matter of American Beef Packers, Inc., 457 F. Supp. 313, 314 (D. Neb. 1978); In re Golf Course Builders Leasing, Inc., 768 F.2d 1167 (10th Cir. 1985). Such a review indicates to the Court that the Bankruptcy Court was in error.

It is true that an action to set aside a post-petition transfer pursuant to 11 U.S.C. § 549(a) may be brought only by a trustee or debtor-in-possession. In re Ciavarella, 28 B.R. 823, 825 (Bankr. S.D.N.Y. 1983). A creditor, such as the Bank, may not rely on Section 549(a) to avoid such a transfer. However, that is not what the Bank is attempting to do here. The Bank has asserted a claim premised on the state law cause of action of conversion, not on Section 549. Conversion has been defined by the Nebraska Supreme Court as "any distinct act of dominion wrongfully asserted over another's property in denial of or inconsistent with that person's rights." PWA Farms, Inc. v. North Platte State Bank, 220 Neb. 516, 519, 371 N.W.2d 102, 105 (1985). See Prosocki v. Commercial National Bank, 219 Neb. 607, 365 N.W.2d 427 (1985). It is a separate and distinct theory of recovery, wholly distinguishable from a claim premised on Section 549. Under Section 549, the trustee seeks to avoid a transfer through return of the funds to the bankruptcy estate. In a conversion action, the plaintiff does not seek a return of the original funds, but

damages in the amount of the funds converted. Here, the Bank is not asking the IRS to return the transferred funds to the estate, but is suing to recover its own damages directly from the defendants in the amount of the transferred funds. The two theories of recovery are ideologically distinct, and while the Bank may not have standing to maintain an action under Section 549, it certainly does have standing to sue for conversion.

Moreover, the language used in Section 549 does not prohibit a creditor from bringing an action based on state law which involves a post-petition transfer by the debtor. The statute simply empowers the trustee to avoid unauthorized post-petition transfers. It does no more than create a cause of action in the trustee under federal bankruptcy law. Section 549 in no way addresses creditor actions which are premised not on federal bankruptcy law, but on state law. The Bankruptcy Court was indeed correct in determining that a creditor does not have standing to bring an action under Section 549. It was in error, however, in characterizing the Bank's state law conversion claim as one brought under Section 549. The conversion claim is distinct, and may be pursued by the Bank in this case.

As the Bankruptcy Court noted, this result comports with the overall scheme of the bankruptcy code and the related jurisdictional statutes. 28 U.S.C. § 157(b)(1) provides that bankruptcy judges may hear and determine all cases under Title 11 and all core proceedings arising under Title 11, or arising in a case under Title 11. It is clear that a dispute such as this

involving competing claims of the debtor and several creditors is within the jurisdiction of the Bankruptcy Court. In In re Major Dynamics, Inc., 14 B.R. 969 (Bankr. S.D. Cal. 1981), the Court recognized the Bankruptcy Court's jurisdiction to determine disputes between third-party creditors and the IRS. So long as the subject matter of the dispute directly affects the debtor or the estate, and resolution is necessary to the rehabilitation of the debtor or the orderly and efficient administration of the debtor's estate, the court said, the Bankruptcy Court would have authority to resolve the dispute. Id. at 972. See In re Douthit, 47 B.R. 428, 431 (M.D. Ga. 1985). The dispute at issue here clearly does affect the debtor and the estate. The Bank not only has standing to bring the action, but may do so in the Bankruptcy Court.

In summary, the Court finds that the Bank does have standing to assert a state law conversion action against the Norris' and the IRS in the Bankruptcy Court. In addition to the standing issue, the parties have raised an issue of sovereign immunity, which was not dealt with by the Bankruptcy Court. The Court declines to reach that issue at this point in the progression of the case. The parties are, of course, free to raise the issue with the Bankruptcy Court upon remand.

Accordingly,

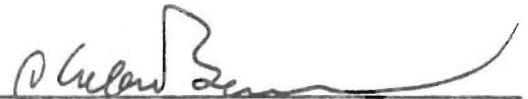
IT IS ORDERED as follows:

1. The decision of the Bankruptcy Court in its order dated May 27, 1986, should be and hereby is reversed.

2. This case should be and hereby is remanded to the
Bankruptcy Court for further proceedings consistent with this
Memorandum and Order.

DATED this 20th day of November, 1986.

BY THE COURT:



C. ARLEN BEAM, CHIEF JUDGE
UNITED STATES DISTRICT COURT