

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)

KIRK C. RICHARDSON,)
DEBTOR)

CASE NO. BK83-1051
A83-691

KIRK C. RICHARDSON,)
Plaintiff)

vs.)

OMAHA POLICE CREDIT UNION, a)
corporation, et al.,)
Defendants)

KEN POLLARD, ET AL.,)
Cross-Claimant)

vs.)

OMAHA POLICE CREDIT UNION,)
Defendant to)
Cross-Claim)

OMAHA POLICE CREDIT UNION,)
Cross-Claimant)

vs.)

KEN POLLARD, VERN HAUGER,)
JACK VACCARO, JAMES DOYLE,)
WILLIAM MISKELL, and JOHN)
McCLELLEN, in their official)
capacities as members of the)
Board of the Trustees of the)
Police and Fireman's)
Retirement System,)

Defendant to)
Cross-Claim)

MEMORANDUM

This matter comes on for consideration by the Court upon a joint motion for summary judgment. The motion is founded upon the

complaint, answers and cross-claims of the various defendants, stipulation of facts filed and docketed with the Court on March 9, 1984. A subsequently filed joint stipulation, if at variance with the March 9 document, is not considered for purposes of this decision due to a failure of the parties to execute same.

The facts of the case, as stipulated, are as follows. The plaintiff and debtor in this action, Kirk C. Richardson, was an employee of the Police Division of the City of Omaha, a member of the Police and Fireman's Retirement System and a contributor to its Trust Fund from July 1, 1970, until June 20, 1981. On the third day of September, 1976, the Omaha Police Federal Credit Union (Credit Union) loaned the debtor \$10,371.58 secured by a promissory note, second real estate mortgage on the plaintiff's residence, and a pledge of plaintiff/debtor's shares at the Credit Union. Approximately one year later, on June 20, 1977, the debtor made and delivered to Bill K. Bloom, an employee of the Credit Union, a Power of Attorney which has, to this date, not been revoked by the debtor. A second note in the amount of \$17,339.47 was given by the plaintiff on June 22, 1978. The note in part was used as refinancing of the prior note and was secured in the same manner with the addition of a security interest given in the debtor's household goods. Similarly, a third loan in the amount of \$22,708.12 was obtained on November 28, 1979; the same security was given for this note. On the 13th of July, 1981, the debtor signed and delivered to the City of Omaha, Police and Fireman's Retirement System, a request for refund of his contributions to the Trust Fund. As of the date of the debtor's termination of employment, the balance in his trust fund was \$12,660.22. This amount was credited several days later to the debtor's credit union savings account by warrant and endorsement from the City of Omaha. On July 27, 1981, the balance due on the debtor's loans with the Credit Union amounted to \$16,596.29, which loan was in default at that time. On that same date the Credit Union set off against the outstanding loan balance the sum of \$12,660.22 from the debtor's share account in accordance with the debtor's pledge of shares. The balance of the loans thereby was reduced to an indebtedness of \$3,936.07. It is also stipulated amongst the parties that the Credit Union, in obtaining a Power of Attorney from the debtor, acted at all times in conformity with current practices of the City of Omaha and in reliance upon the November 2, 1971, Legal Opinion to the Credit Union from the City of Omaha. Further, the parties agree, that Chapter 22 Article III of the Omaha Municipal Code which sets forth the terms, conditions, and provisions of the Police and Fireman's Retirement System were in full force and effect at all times relevant to the instant case, and that the fund established by Section 22-87 of the Omaha Municipal Code constitutes a spend-thrift trust.

The sole issue before the Court is whether the payment of the funds, originally part of the debtor's entitlement under the Omaha Police and Fireman's Retirement System, to the Omaha Federal Credit Union in partial satisfaction of the debtor's obligations was a breach of trust by defendant City of Omaha or whether lawful transfer to and set-off by the Omaha Police Credit Union occurred.

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Applicable to this issue is Section 22-87 of the Omaha Municipal Code which states in pertinent part that the right of a participant in the Police and Fireman's Retirement System (P.F.R.S.) to retirement allowance, return of accumulated contribution to the system, or any other right under the system is unassignable and shall not be sold, executed upon, garnished or attached. Section 22-86 of the Omaha Municipal Code provides that any member of the system who leaves the City's employ prior to his eligibility to receive retirement benefits shall be refunded the total contributions he has made plus accumulated regular interest, with certain exceptions not applicable in the instant case. It is the contention of the plaintiff/debtor that the Power of Attorney executed by him which gave the right to his pension receipts to the Credit Union was an invalid assignment of those proceeds and that the assignment was made as a condition precedent to receiving any money by way of loan from the Credit Union. The Credit Union counters with the argument that the Power of Attorney which it received from the debtor was a revocable instrument which the debtor did not and has not revoked and that the instrument was not a condition precedent to the loan. The Credit Union avers that the Power of Attorney does not fall within the parameters of the Municipal Code section as it is neither assignment, sale, execution, garnishment or attachment but rather a set-off against an account. Alternatively, if the Power of Attorney is an assignment, the restrictions imposed by the Municipal Code do not extend beyond the time that the proceeds of the Retirement System are paid out to the beneficiary. In its answer, the Board of Trustees of the P.F.R.S. point to a document, "City of Omaha, Police and Fireman's Retirement System Request for Refund". The request was made solely by the debtor as his application for return of contributions made into the fund. In accordance with that application, the P.F.R.S. paid to the Credit Union proceeds of the fund but did so at the debtor's direction. The debtor, the Board argues, cannot come to court at this time and argue that he did otherwise. Denomination of the Power of Attorney as an assignment is irrelevant because the debtor revoked it himself by requesting return of the contributions and not relying upon his appointed attorney to request the return.

The document referred to as the Power of Attorney appoints Bill K. Bloom attorney. . . "to collect from the City of Omaha any funds to which I may be entitled to, which are currently or hereafter payable to me by the City as final salary and/or the sum in the Omaha Police and Firemans Pension Fund of the City of Omaha, due me on termination of my employment by the City of Omaha, and to deposit said sums or sum in my savings account in the Omaha Police Federal Credit Union." The Power of Attorney is expressly limited by its terms to collecting the sum due, cashing the check, and depositing the funds in the debtor's savings account in the Omaha Police Federal Credit Union.

The first issue raised is one of jurisdiction. It is the argument of the plaintiff/debtor that the funds to which he is entitled are proceeds of a spend-thrift trust exempted from

property of the estate pursuant to 11 U.S.Code §541(c)(2). While the Court agrees that spend-thrift trusts are exempted from property of the estate as defined in that Code section, the debtor's termination of employment with the Police Department and his subsequent authorization for release of the funds, an action entirely within his rights, the spend-thrift trust was terminated. Effective upon the debtor's termination of employment and withdrawal from the pension system, the debtor was free to do whatever he chose with the proceeds of his retirement. They were his to freely spend or save as he chose and were no longer subject to any restriction as to the moneys' disposition. See First National Bank v. First Cadco Corp., 189 Neb. 735 (1973).

Turning now to the specific facts of the instant case, the Court finds generally in favor of the defendant and against the plaintiff for the following reasons. The Omaha Municipal Code Section 22-87 clearly prohibits the sale, garnishment, attachment or execution upon the proceeds of the retirement system from the Police and Firemen's Pension Fund. And further provides in Section 22-86 of the municipal Code that if for any reason the employee is terminated or voluntarily leaves employment with the eligible groups, he may request refund of his contributions plus any interest which has accrued thereon. In the instant case, the debtor did not execute an assignment nor were the proceeds from his pension fund garnished or attached. Rather, nearly one year after receiving his first loan, the debtor/plaintiff executed a Power of Attorney. The denomination "Power of Attorney" is not controlling. It is instead the effect of that document upon which the Court relies. The Power of Attorney is not a direct assignment of proceeds; it appoints as attorney in fact Bill K. Bloom to do only certain things. The power is expressly limited to collecting sums due under the pension system, cashing the check, and depositing the check in the debtor's savings account in the Omaha Police Federal Credit Union. The proceeds thereby are paid directly to the debtor and not, as in the case of an assignment, to the Credit Union itself. The document provided a form of security for the Credit Union against the outstanding loan balances held by the debtor and were subject upon transfer into the debtor's savings account to any rights of setoff in a bankruptcy proceeding permitted under Bankruptcy Code. The debtor was under no obligation to withdraw his funds and deposit them with the Credit Union. But here, notwithstanding the execution of the Power of Attorney, the debtor himself executed on July 13, 1981, the "Request for Refund", thereby authorizing the transfer.

The Board of Trustees of the Omaha Police and Fireman's Retirement System cannot be held to be in breach of trust for paying out monies held in the retirement system to the plaintiff/debtor at his request. The Board's duty under the trust terminated with the debtor's employment and upon withdrawal of those funds from the retirement system as was the plaintiff's right. It is unnecessary, therefore, for the Court to address the conflicting cross claims of the defendants' Credit Union and Board of Trustees. A separate judgment will be entered in accordance with the foregoing.

DATED: April 16, 1984.

BY THE COURT:


U.S. Bankruptcy Judge

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