

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

FILED
DISTRICT OF NEBRASKA
AT _____ M
OCT - 2 1984
William L. Olson, Clerk
By _____ Deputy
CV 84-0-263

IN RE:)
KIRK C. RICHARDSON,)
Debtor.)
KIRK C. RICHARDSON,)
Plaintiff,)
vs.)
OMAHA POLICE CREDIT UNION,)
et al.,)
Defendants.)

MEMORANDUM AND ORDER

This matter is before the Court on appeal from a judgment of the United States Bankruptcy Court for the District of Nebraska entered on April 16, 1984 (filings 19 and 20). The plaintiff/debtor filed an adversary proceeding to recover a payment of funds from the plaintiff/debtor's pension fund account to the defendant Credit Union. The payment was allegedly made in breach of a trust imposed on the defendant City (filing 1). The matter was submitted to the Bankruptcy Court pursuant to the parties' joint motion for summary judgment (filing 5) and joint stipulation of facts (filing 4). The Bankruptcy Court sustained the motion for summary judgment in favor of the defendants and against the plaintiff concluding that no breach of trust occurred. After reviewing the record submitted on appeal and the briefs submitted, the Court affirms the judgment of the Bankruptcy Court as to all issues raised on appeal for the reasons set forth below.

The facts of the case are as follows:

The plaintiff and debtor in this action Kirk C. Richardson (plaintiff) was an employee of the City of Omaha Police Division. He was a member of the Police and Fireman's Retirement System (PFRS) and contributed to it from July 1, 1970, until June 20, 1981.

On September 3, 1976, the plaintiff borrowed \$10,371.58 from the Omaha Police Federal Credit Union (Credit Union). The loan was secured by a promissory note, a second real estate mortgage on the plaintiff's house, and a pledge of the plaintiff's Credit Union shares.

The following year, on June 20, 1977, the plaintiff executed a power of attorney appointing as attorney in fact an employee of the Credit Union, Mr. Bill K. Bloom. The plaintiff instructed Mr. Bloom to collect any PFRS funds that may become payable to the plaintiff and deposit them into the plaintiff's Credit Union savings account. The plaintiff did not revoke the power.

On June 22, 1978, the plaintiff executed a second note to partially refinance the prior note. The second note was similarly secured with the addition of a security interest given in the plaintiff's household goods. Then in 1979, the plaintiff obtained a third loan from the Credit Union, the same security was given.

On June 20, 1981, the plaintiff was dismissed from employment with the Police Division of the City of Omaha. On July 13, 1981, the plaintiff requested in writing a refund of his contributions to the PFRS. In accord with the unrevoked power of attorney that the plaintiff had executed, the City

of Omaha issued a warrant for \$12,660.22, the balance of the plaintiff's fund, with the restrictive endorsement, "FOR DEPOSIT ONLY in the savings account of Kirk C. Richardson in the Omaha Police Federal Credit Union by order dated 6/20/77." On July 24, 1981, the plaintiff's Credit Union account was credited for \$12,660.22, bringing the total amount of shares in his account to \$12,666.66.

On July 27, 1981, the plaintiff was in default on his loan from the Credit Union. The outstanding balance of the third Credit Union loan was \$16,596.29. On the same day the Credit Union set off the \$12,660.22 from the plaintiff's share account in accordance with the loan's security agreement against the loan balance of \$16,596.29. This reduced the outstanding indebtedness to \$2,936.07.

Additionally, the parties stipulated that the Credit Union, in obtaining a power of attorney from the debtor was acting in conformity with the current practices of the City of Omaha and in compliance with a Legal Opinion to the Credit Union from the City of Omaha, dated November 2, 1971. Further, the parties agree, that Chapter 22, Article III of the Omaha Municipal Code which sets forth the terms, conditions and provisions of the PFRS 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 spendthrift trust.

The first issue the Bankruptcy Judge addressed was whether the Bankruptcy Court had jurisdiction over the matter. Pursuant

to 11 U.S.C. Section 541(c)(2) a spendthrift trust such as this is exempt from the property of the estate. This Court, however, agrees with the Bankruptcy Judge that the trust terminated with the employee's right to receive the benefits and withdrawal from the pension system. In First National Bank of Omaha v. First Cadco Corp., 189 Neb. 734, 205 N.W.2d 115, 118 (1973), the court stated:

[A] construction [of the trust instrument] which would allow the spendthrift protection to continue after the termination of the trust period and during the time when the beneficiary had the right to demand delivery would allow her [the beneficiary] to establish a spendthrift trust for herself. It is uniformly held to be against public policy to permit a person to tie up his own property in such a way he can still enjoy it but can prevent his creditors from reaching it.

205 N.W.2d at 118 (citations omitted). Omaha Code Section 22-86 provides that:

Any member of this system whose employment with the city shall be severed or terminated voluntarily or for cause prior to attaining eligibility . . . shall be paid a refund of his or her total contributions Any member . . . who shall have his or her contributions refunded shall thereby forfeit any and all benefits under the system

Id. The trust did terminate with the plaintiff's withdrawal from the pension system.

On appeal the plaintiff raises three issues: (1) that the court erred in determining that no breach of trust occurred; (2) that the Court erred in determining that the debtor's pension proceeds were payable directly to the debtor; and (3) that the Court erred in not finding that the power of attorney was void as in violation of Omaha Municipal Code Section 22-87.

I.

With regard to the first issue the plaintiff has raised on appeal, the Bankruptcy Court properly held that the Board of Trustees of the PFRS did not breach its trust agreement. The Bankruptcy Court held that the Board's duty under the trust terminated to the plaintiff when the plaintiff's employment ended and he withdrew his funds. This holding is in accord with both the terms of the trust and state law as discussed previously in this Memorandum. See Omaha Municipal Code § 22-87; First National Bank of Omaha, 205 N.W.2d at 118.

Furthermore, even if the trust had not yet terminated when the transfer of funds occurred, the trustee would not be subject to liability for acting at the direction of the beneficiary. Restatement of Law (Second) Trusts § 152, comment i (1959) (no liability if payment made on the order of the beneficiary whether to a third party or to the credit of the beneficiary in a bank designated by him; no liability if order given before right to income accrued or even if the payment was in the form of an assignment); Restatement of Law (Second) Trusts § 342, comment f, (beneficiary cannot hold trustee liable for transferring property at beneficiary's direction whether such transfer was precluded by the terms of the trust or by statute and beneficiary cannot compel the trustee to make restitution).

II.

The last two issues the plaintiff raises on appeal will be considered together. As stated before Omaha Code Section 22-87 prohibits the assignment, sale, execution, garnishment or attachment of the PFRS. The key issue becomes whether the power of attorney was an assignment in violation of the trust.

Under Nebraska law, "[w]hen an act or agreement of parties disappoints the purpose of the settlor [of a spendthrift trust] by divesting a property or income from the purposes named, such act is void ab initio." First National Bank of Omaha, 205 N.W.2d at 118. In the case at hand, the power of attorney could not be considered an assignment. As the Bankruptcy Court noted, while the power of attorney was given as a form of security for the plaintiff's loans it was given nearly one year after the first loan. It appointed the attorney-in-fact only to collect the fund as it became available, cash the check and deposit the fund into the plaintiff's savings account. The plaintiff was in fact the legal owner of the funds when they were placed into the account and remained so until the set off.

While this Court could find no Nebraska cases that distinguish between "assignment" and "power-of-attorney," the Court in Smith v. United States, 113 F. Supp. 702, 707 (D.C. Ha. 1953) considered the differences between a power of attorney and a voluntary assignment. In drawing the distinction, the Court noted that "a power of attorney creates an agency relationship, and the giver of the power remains the legal owner," whereas a "[voluntary assignment requires] a divestment of all the property of the debtor." Id. at 707. Using those definitions, the Court held that the power of attorney, such as given in the case to secure a trust chattel mortgage was not a voluntary assignment because there was no divestment of all property. This Court does not go so far as to say that under Nebraska law an assignment requires

a divestment of all of a debtor's property interest to be classified as an assignment. However, this Court agrees with the Bankruptcy Court that under this arrangement an agency relationship did exist between the plaintiff and the attorney-in-fact, and that the funds were paid over at the direction of the principal, the plaintiff, into the plaintiff's account. Such plan does not entail a sufficient divestment of interest to be classified as an assignment that would disappoint the purposes of the spendthrift trust, since the funds were actually available for the use of the plaintiff. The Credit Union did not set off the account pursuant to its security interest in the Credit Union shares until several days after the transfer.

The plaintiff urges the Court to adopt the broad definition of alienation and assignment adopted by Congress in Treas. Reg. Section 1.40(a)-13(c). The Court does not find plaintiff's arguments to be persuasive. In this case the plaintiff requested the return of funds and the funds were deposited into his Credit Union account for his benefit.

Accordingly,

IT IS ORDERED that the judgment of the Bankruptcy Court is hereby affirmed.

DATED this 2nd day of October, 1984.

BY THE COURT:



C. ARLEN BEAM
UNITED STATES DISTRICT JUDGE