

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
KRISTY JEAN HOGSETT,) CASE NO. BK00-82678
)
Debtor.) A01-8034
_____)
KRISTY JEAN HOGSETT,)
) CH. 7
Plaintiff,)
vs.)
) Filing No. 10
)
CREDIT BUREAU OF SCOTTSBLUFF, INC.)
d/b/a CREDIT BUREAU OF WESTERN)
NEBRASKA,)
)
Defendant.)

MEMORANDUM

This memorandum contains findings of fact and conclusions of law required by Fed. R. Bankr. P. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(F).

Debtor brought this adversary proceeding under 11 U.S.C. § 547 to recover alleged preferential payments received by the Credit Bureau of Western Nebraska ("Credit Bureau") as a result of garnishing the debtor's paychecks.

The Credit Bureau obtained a judgment against Ms. Hogsett on July 5, 2000, for \$620.63, plus attorney's fees of \$67.06, court costs of \$21.98, and post-judgment interest at 7.37 percent. The creditor then obtained an order of garnishment and received \$742.35 withheld from Ms. Hogsett's paychecks between September 8, 2000, and November 17, 2000. Ms. Hogsett filed her Chapter 7 petition on November 20, 2000. The Credit Bureau subsequently refunded \$88.42 received after the petition date, and retained the remaining \$653.93.

The Chapter 7 Trustee declined to pursue the alleged preferences, so the debtor filed this adversary action in March 2001, to recover the \$653.93. The debtor asserts in her complaint that she claimed the garnished amount as exempt property in her bankruptcy schedules. However, the only entry on

Schedule C that resembles such an exemption is a \$700.00 "claim against Panhandle Collections" listed as exempt pursuant to Neb. Rev. Stat. § 25-1552, which exempts \$2,500 in personal property other than wages. She asserts that she is claiming an exemption not in the wages but in the chose of action against the Credit Bureau.

The claim of exemption is relevant because the debtor has standing to pursue a preference action only if (1) the property transferred would have been exempt; (2) the property was not transferred voluntarily; and (3) the trustee has not brought an avoidance action. James v. Planters Bank, 257 B.R. 673, 675 (B.A.P. 8th Cir. 2001) (citing Wade v. Midwest Acceptance Corp. (In re Wade), 219 B.R. 815, 819 (B.A.P. 8th Cir. 1998) and 11 U.S.C. § 522(g)-(h)).

In this case, the second and third prongs of the test are not in dispute. Regardless of how the exemption is currently characterized, the money at issue presumably would have been exemptible as personal property had it or property purchased with it been in the debtor's possession on the petition date. Therefore, the debtor has standing to pursue this preference action.

The first issue to be addressed concerning the potential avoidance of these garnishments is whether the transfers can be avoided at all. Under § 547(c)(8), a trustee cannot avoid a transfer "if, in a case filed by an individual debtor whose debts are primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than \$600."

The Credit Bureau argues that each instance of withholding should be considered a separate "transfer," each for less than \$200, such that the \$600 threshold cannot be met. The Nebraska statute on garnishment in aid of execution does not follow such an interpretation, however. Section 25-1056 makes clear that the purpose of garnishment is to satisfy a judgment. The garnishee withholds the appropriate amount from the judgment debtor's pay and forwards that sum "to the issuing court to record the judgment payment prior to the court delivering the payment to the judgment creditor or assignee." § 25-1056(2). If the creditor requests a continuing lien against the debtor's wages, that lien continues only until the underlying judgment is satisfied in full. § 25-1056(3)(a). Wage garnishment essentially provides installment payments on a judgment debt. Therefore,

each periodic withholding pursuant to a garnishment order is a portion of the total amount transferred to the judgment creditor. The amount of the "transfer" at issue here is \$653.93.

The second issue concerns whether and which payments were made within the 90-day preference period. The question is whether the "transfer" occurred on the date the debtor earned the wages or on the date the check was issued to the creditor in payment of the garnishment.

Under the Nebraska statutory scheme on garnishments, each avoidable portion of the transfer occurred on the date the debtor worked for the wages. Section 25-1056(2) provides that "[b]eginning with the pay period during which the writ is served and while the continuing lien remains in effect, the garnishee shall deliver the nonexempt earnings to the court from which the garnishment was issued for each pay period" Section 25-1558 defines "earnings" as "compensation paid or payable for personal services." § 25-1558(4)(a).

Therefore, the wages subject to garnishment became payable to the debtor at the time she performed the work. See In re James, 257 B.R. at 676-77 (interpreting Arkansas garnishment law). The transfer occasioned by a garnishment becomes effective for purposes of a preference analysis when the debtor acquires rights in the property transferred. In re Wade, 219 B.R. at 821 and 11 U.S.C. § 547(e)(3). See also In re Morehead, 249 F.3d 445, 448 (6th Cir. 2001) (Applying Kentucky law and holding that when wages are earned during the preference period, transfer of those wages pursuant to a garnishment order is avoidable under 11 U.S.C. § 547(b)(4)(A); In re White, 258 B.R. 129 (Bankr. D.N.J. 2001).

Accordingly, any garnishment of wages earned by Ms. Hogsett within ninety days of the bankruptcy petition, from and after August 22, 2000, and before November 20, 2000, is, as a matter of law, a preference and is hereby avoided.

Separate judgment shall be entered.

DATED: October 9, 2001

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:

*David Brostrom, Atty. for Defendant, 402/729-5539

Copies mailed by the Court to:

United States Trustee

Doyle Morse, Atty. for Debtor/Plaintiff, 416 Logan St.,

P.O. Box 916, Holdrege, NE 68949

law clerk

Movant (*) is responsible for giving notice of this journal entry to all other parties not listed above if required by rule or statute.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
KRISTY JEAN HOGSETT,) CASE NO. BK00-82678
)
Debtor.) A01-8034
_____)
KRISTY JEAN HOGSETT,)
) CH. 7
Plaintiff,)
vs.)
) Filing No. 10
)
CREDIT BUREAU OF SCOTTSBLUFF, INC.)
d/b/a CREDIT BUREAU OF WESTERN)
NEBRASKA,)
)
Defendant.)

JUDGMENT

Judgment is entered in favor of plaintiff and against defendant. The transfer of debtor/plaintiff's wages in the amount of \$653.23 by garnishment to defendant is an avoidable preference under 11 U.S.C. § 547 and is avoided. See Memorandum entered this date.

DATED: October 9, 2001

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:

*David Brostrom, Atty. for Defendant, 402/729-5539

Copies mailed by the Court to:

United States Trustee
Doyle Morse, Atty. for Debtor/Plaintiff, 416 Logan St.,
P.O. Box 916, Holdrege, NE 68949

Movant (*) is responsible for giving notice of this journal entry to all other parties not listed above if required by rule or statute.