

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF )

MICHAEL & GAIL LOWE, )

DEBTOR )

CASE NO. BK85-1778

MEMORANDUM OPINION

This matter came on for hearing on August 19, 1987, on the debtor's motion to avoid lien and the Alliance National Bank & Trust Company's objection to that motion. Appearing on behalf of the debtor was David Nuttleman of Gering, Nebraska. Appearing on behalf of the Alliance National Bank & Trust Company was A. T. Reddish of Alliance, Nebraska.

The facts in this case have been recited at great length in the Court's opinions of May 22, 1986, and May 18, 1987. Therefore, a very brief recitation of the facts will follow. In 1982 the debtor negotiated a "Release and Settlement Agreement" with Union Pacific Railroad Company as a result of alleged personal injuries on the part of the debtor. On May 20, 1983, and again on March 14, 1984, concurrently with the execution of certain promissory notes by the debtor, the debtor executed to the Alliance National Bank & Trust Company (the "Bank") two assignments of the proceeds from the Union Pacific settlement. The Bank filed each of the two assignments with the Box Butte County Clerk on August 1, 1985, and with the Nebraska Secretary of State on August 7, 1985. On August 8, 1985, the debtor filed his Chapter 7 petition. On May 18, 1987, this Court ruled that those assignments were valid transfers of the debtor's interest in the settlement agreement; that the assignments removed the annuity from the exempt status under Section 44-371, Neb. Rev. Stat. (Reissue 1984); and that the assignments were binding between the debtor and the Bank.

The debtor has now filed a motion to avoid the Bank's lien, alleging that any such lien impairs the annuity exemption claimed by the debtor pursuant to Section 44-371 Neb. Rev. Stat. (Reissue 1984) and further that the Bank's security interest constitutes a preferential transfer which occurred within ninety days of the date of the filing of the debtor's Chapter 7 petition. Specifically, the debtor claims that the Bank's lien may be avoided pursuant to Section 522(h) and Section 547 of the United States Bankruptcy Code.

Section 522(h) of the Bankruptcy Code refers both to Section 522(g) and Section 547. The debtor may only avoid a transfer under Section 522(h) to the extent that he could have exempted such property if the trustee had avoided such transfer under Section 522(g)(1). Section 522(g)(1) requires that the transfer be an involuntary transfer. The assignments in the instant case were not involuntary, so Section 522(g)(1) does not apply.

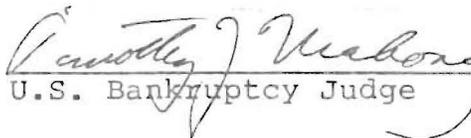
As to Section 547, this Court agrees with the Bank's contention that perfection is important only with regard to the priority of the lien as to third parties. The Court finds that the transfer in this case took place when the assignments were made, and the liens became enforceable against the parties to the transaction at that time. Section 547 does not apply to such a situation.

Finally, the argument that the liens impaired the annuity exemption must fail. As the Court has already stated, the transfer of the debtor's interest occurred at the time of the assignment. The assignment of the annuity triggered its removal from the exemption statute. Therefore, there is no impairment of an exemption.

The debtor's motion to avoid lien is overruled, and the Bank's objection to the motion is sustained.

DATED: November 2, 1987.

BY THE COURT:

  
U.S. Bankruptcy Judge

Copies to:

David Nuttleman, Attorney, Box 340, Gering, NE 69341

A. T. Reddish, Attorney, Box 827, Alliance, NE 69301