

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
RANDALL & DAWN VESKERNA,) CASE NO. BK96-81635
)
DEBTOR) CH. 7

MEMORANDUM

Hearing was held on September 30, 1996, on Motion for Relief filed by Fremont First Central Federal Credit Union. Appearances: Avis Andrews for the debtors and David Mitchell for the bank. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(G).

Background

In 1994, the debtors executed an Application and Credit Agreement and a Promissory Note in the amount of \$2,500 with Fremont First Central Federal Credit Union (the Credit Union). The Application and Credit Agreement provided that the debtors agreed that the advances under the note would be secured by deposits in accounts held with the Credit Union. As of July 29, 1996, the date the debtors filed their voluntary Chapter 7 petition, there was an amount of \$1,087.27 owing.

On January 28, 1995, the debtors executed a VISA Credit Card Agreement. As of July 29, 1996, there was an amount of \$7,893.96 owing.

On the date the debtor's filed bankruptcy, there was \$3,713.20 on deposit in debtors' account at the Credit Union. The Credit Union placed an administrative freeze on the account on August 7, 1996, and on that date there was a balance of \$3,860.66 in the debtors' account. However, in between the date of the petition and the date the freeze was placed on the account, a number of transactions had occurred.

While the total number of transactions that occurred during this time period and the total amount represented by those transactions is not in evidence, it is undisputed that during this time the debtors deposited a check in the amount of \$3,290.35. This check was for hail damage to their house, and had been endorsed by First National Bank of Omaha, the debtor's mortgagee. Therefore, more than 85% of the funds on hand on August 7, 1995 were from funds deposited into the account postpetition.

The Credit Union has moved for relief from the automatic stay so that it can exercise its contractual setoff rights.

Decision

The Credit Union's motion for relief from the automatic stay is overruled in part.

Discussion

The Credit Union has argued that the debtors were entitled to receive the insurance proceeds prepetition, and the funds are therefore property of the bankruptcy estate. Apparently, the Credit Union contends that because the funds are property of the estate, they are the proper subject of a set off.

Whether the funds are the property of the estate is not an issue presently before the court, but even assuming the funds are property of the estate, as contended by the credit union, that does not necessarily make them subject to a setoff.

In keeping with the general theory permeating the Code, the filing of the petition represents the point of demarcation, after with sums deposited with a bank may not be set off against the debtor's indebtedness to the bank. The bank may have a right of setoff as to the existing deposit balance when the petition is filed, but such right does not extend to subsequent deposits, and *they are recoverable by the trustee as property of the estate under section 541(a) or 542(b)*.

4 LAWRENCE P. KING, ET AL, COLLIER ON BANKRUPTCY ¶ 553.15[4], at 553-80 (15th ed. 1996) (emphasis supplied). See, Orient River Investments, Inc. v. Equibank (In re Orient River Investments, Inc.), 105 B.R. 790 (Bankr. E.D. Pa. 1989); Citizens Fidelity Bank & Trust Co. v. All-Brite Sign Service Co. (In re All-Brite Sign Service Co.), 11 B.R. 409 (Bankr. W.D. Ky. 1981). See, also, Cooper-Jarret, Inc. v. Central Transport, Inc., 726 F.2d 93, 96 (3d Cir. 1984) ("It is clear under [§ 553] that a creditor may not set off its prepetition claims against a debt owed to the debtor which came into existence after the filing of the bankruptcy petition.") Therefore, the Credit Union may not set off the insurance proceeds, as they were deposited postpetition.

The evidence is insufficient to determine the date of deposit of the remaining \$570.31. As the creditor bears the burden of proof in establishing a valid right of setoff under § 553 of the Bankruptcy Code, Pester Refining Co. v. Mapco Gas Products, Inc. (In re Pester Refining Co.), 845 F.2d 1476 (8th Cir. 1988), the Credit Union has failed to establish that the remaining funds are the proper subject of a setoff. Accordingly,

none of the funds on account with the Credit Union that were frozen on August 7, 1996 may be setoff.

However, the administrative freeze may remain in effect for thirty more days. During that time, the Credit Union may submit evidence concerning the date the remaining \$570.31 was deposited. In addition, during that time, the trustee may review the matter to determine if the insurance proceeds are property of the estate and/or are exempt property.

The Credit Union's motion for relief from the automatic stay is overruled, to the extent of \$3,290.25.

Separate journal entry to be filed.

DATED: October 3, 1996

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:

ANDREWS, AVIS 402-727-4152
MITCHELL, DAVID C. 402-721-6198

Copies mailed by the Court to:

James J. Stumpf, Trustee, 4780 So. 131st St., Omaha, NE
68137
United States Trustee

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

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
)	
RANDALL & DAWN VESKERNA,)	CASE NO. BK96-81635
)	A
<u>DEBTOR(S)</u>)	CH. 7
)	Filing No. 6, 10
Plaintiff(s))	
vs.)	<u>JOURNAL ENTRY</u>
)	DATE: October 3, 1996
<u>Defendant(s)</u>)	HEARING DATE: September
)	30, 1996

Before a United States Bankruptcy Judge for the District of Nebraska regarding Motion for Relief filed by Fremont First Central Federal Credit Union; Resistance by debtors.

APPEARANCES

Avis Andrews, Attorney for debtor
David Mitchell, Attorney for bank

IT IS ORDERED:

The Credit Union's motion for relief from the automatic stay is overruled, to the extent of \$3,290.25. See memorandum entered this date.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

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