

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
)	
RINE & RINE AUCTIONEERS, INC.,	)	CASE NO. BK92-80770
)	
DEBTOR	)	A94-8016
)	
WEST GATE BANK,)	
)	
Plaintiff	)	CH. 7
vs.)	
)	
RICHARD D. MYERS, TRUSTEE,)	
)	
Defendant)	

MEMORANDUM

Hearing was held on December 6, 1994, on the adversary complaint. Appearing on behalf of the trustee were David Crawford and Chris Curzon of Schmid, Mooney & Frederick, Omaha, Nebraska. Appearing on behalf of West Gate Bank was Carl Sjulín of Rembolt, Ludtke, Parker & Berger of Lincoln, Nebraska. 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)(A), (F) and (O).

Background

The debtor was in the business of auctioning personal property for its customers. West Gate Bank (Bank), prior to debtor's bankruptcy, employed the services of the debtor to sell certain business personal property which was owned by a customer of the Bank but was in possession of the Bank through a consensual arrangement between the customer and the Bank. The Bank, representing its interest in the property and its customer's interest in the property entered into an oral agreement with the debtor whereby the property was made available to the debtor, and the debtor was to advertise and conduct a sale, collect the proceeds of the sale and remit the proceeds to the Bank.

The Bank did make the property available to the debtor. The debtor did advertise and conduct the sale. The debtor did collect the proceeds of the sale and deposited those proceeds into its general business account. Although the debtor, pursuant to the agreement between the parties, was to remit the net proceeds to the Bank within fourteen days after the sale, the debtor failed to do so, and instead, the debtor used all of the proceeds to pay its own creditors.

After the bankruptcy petition was filed, the trustee pursued actions to avoid the transfers to debtor's creditors from the proceeds of the sale. The Bank brought this action to obtain an order impressing the Bank's interest on any funds obtained by trustee from transferees of the proceeds.

Findings of Fact

There are no undisputed factual issues. The parties have agreed upon the following facts:

A. Plaintiff is a Nebraska banking corporation located and doing business in Nebraska and is a creditor and party in interest in the bankruptcy case.

B. Defendant is the trustee of the above-captioned bankruptcy case.

C. On or about April 27, 1992, debtor filed a petition for relief under Chapter 7 of Title 11, United States Code, with the Clerk of the United States Bankruptcy Court for the District of Nebraska.

D. At all times material to this case, plaintiff was engaged in a debtor/creditor relationship with Lincoln Marine, Inc., a Nebraska corporation located in Lancaster County, Nebraska and engaged in the marine business ("Lincoln Marine").

E. On or about December, 1991, plaintiff declared a default in the loan obligations due and owing to plaintiff from Lincoln Marine. The debt owed by Lincoln Marine to plaintiff was accelerated and became immediately due and owing in the approximate amount of \$433,453.23.

F. Lincoln Marine owned personal property consisting of, among other things, boats, trailers, motors, and marine accessories (the "Property").

G. Plaintiff has duly filed a proof of claim in the above-captioned bankruptcy case which contains true and accurate copies

of the loan and security documents regarding plaintiff's security interest in the Property.

H. Subsequent to plaintiff declaring default, Lincoln Marine turned over possession of the Property to plaintiff so that plaintiff could exercise the creditor's rights to which it was entitled.

I. In January, 1992, plaintiff retained debtor as its agent to conduct a public auction of the Property on behalf of plaintiff.

J. The auction was conducted by debtor on February 16, 1992. The gross proceeds from the Lincoln Marine auction were approximately \$149,128.60.

K. On February 18, 1992, debtor deposited the Lincoln Marine auction proceeds in debtor's checking account at American National Bank.

L. During the eight-day period from February 18 through February 26, 1992, debtor executed a number of checks to various creditors of debtor and Tom Rine which were paid from debtor's account at American National Bank.

M. Defendant has filed the following adversary proceedings in the above-captioned bankruptcy case which seek to set aside and otherwise recover certain transfers made by debtor as voidable preferences under 11 U.S.C. § 547, fraudulent conveyances under 11 U.S.C. § 548 and applicable state law; the monies that were paid between February 18 and February 26, 1992 are indicated:

- (1) Richard D. Myers v. Eastman Kodak, A93-8096, (\$1,321.31);
- (2) Richard D. Myers v. Copiers, Copiers, Copiers, et al., A93-8079, (\$3,536.00);
- (3) Richard D. Myers v. Hansen Bldg. Specialties, A93-8091, (\$1,853.00);
- (4) Richard D. Myers v. WOW, A93-8090, (\$3,636.80);
- (5) Richard D. Myers v. Robert Towne, A93-8087, (\$241.20);
- (6) Richard D. Myers v. Progress West, A93-8085, (\$1,927.9);

- (7) Richard D. Myers v. Omaha Temps, A93-8084, (\$3,967.41);
- (8) Richard D. Myers v. Werner Enterprises, A93-8103, (\$1,649.10);
- (9) Richard D. Myers v. American Business Information, A93-8109, (\$2,969.00);
- (10) Richard D. Myers v. KFAB, A93-8095, (\$12,338.60);
- (11) Richard D. Myers v. Bekins Moving & Storage, A93-8105, (\$2,561.81);
- (12) Richard D. Myers v. All Makes Office Equipment, A93-8106, (\$4,979.00);
- (13) Richard D. Myers v. Lazier Kavich, A94-8042, (\$6,500.00);
- (14) Richard D. Myers v. Southwest Bank & Trust and Cliff's, Inc., A94-8063, (\$11,291.33);
- (15) Richard D. Myers v. American National Bank, A94-8064, (\$28,363.46).

N. Plaintiff and defendant have entered into a Stipulation wherein plaintiff agreed to dismiss the state law conversion action it was prosecuting against Don Hall in the District Court of Douglas County under the caption West Gate Bank v. Don Hall, Docket 924, Page 002. Plaintiff has dismissed said action pursuant to said Stipulation and reserved all of its rights to recover the \$17,000 payment received by defendant which plaintiff alleges is the lawful property of plaintiff. Defendant did not file any adversary proceeding against Don Hall.

O. Plaintiff is currently prosecuting in Douglas County District Court a state law conversion action under the caption West Gate Bank v. American National Bank, Docket 921, Page 907, wherein plaintiff seeks to recover certain payments received by American National Bank which plaintiff alleges are the lawful property of plaintiff.

P. Plaintiff is currently prosecuting a state law conversion action in the Douglas County District Court under the caption West Gate Bank v. Cliff's, Inc. and Southwest Bank, Docket 924, Page 960, wherein plaintiff seeks to recover the \$11,291.33 payment received by Cliff's, Inc. and Southwest Bank that plaintiff alleges is the lawful property of plaintiff.

Q. Plaintiff and defendant have entered into a Stipulation wherein plaintiff has agreed to dismiss the state law conversion action it was prosecuting against Lazier Kavich under the caption West Gate Bank v. Lazier Kavich, Docket 924, Page 964. Plaintiff has dismissed said action pursuant to this Stipulation and reserved all of its rights to recover the \$6,500.00 payment received by Lazier Kavich which plaintiff alleges is the lawful property of plaintiff when the same is recovered through the adversary proceeding filed against Lazier Kavich by defendant.

Discussion and Legal Conclusions

This Court has previously dealt with some of the same issues raised in this case. In Myers v. Douglas County Bank, Neb. Bkr. 94:190 (Bankr. D. Neb.), aff'd, Neb. Bkr. 94:711 (D. Neb. 1994), and in Natkin & Co. v. Myers, Neb. Bkr. 94:193 (Bankr. D. Neb.), aff'd, Neb. Bkr. 94:760 (D. Neb. 1994), this Court, and the District Court, on appeal, found that the relationship between an auctioneer and the party who has employed the services of the auctioneer to sell personal property is that of principal and agent. See also Edwin Bender & Sons v. Erickson Livestock, 228 Neb. 157, 421 N.W.2d 766 (1988). In Natkin, supra, the court further found that the principal/agent relationship ends when the purpose of the relationship is achieved. See also RESTATEMENT (SECOND) OF AGENCY § 106 (1958); Boettcher DTC Bldg. Joint Venture v. Falcon Ventures, 762 P.2d 788, 790 (Colo. App. 1988); One Twenty Realty Co. v. Baer, 260 Md. 400, 272 A.2d 377, 381-82 (1971), Hardy v. Davis, 223 Md. 229, 164 A.2d 281, 283 (1960); Bassett v. Mechanics' Bank, 173 A. 228, 118 Conn. 490 (1934).

In addition to the above-cited cases, the Nebraska Supreme Court, in Watkins v. Waits, approved the following definition of an agent,

An agent is one who acts for or in the place of another by authority from him; one who undertakes to transact some business or manage some affairs for another by authority and on account of the latter, and to render an account of it. He is a substitute, a deputy appointed by the principal, with power to do the things which the principal may or can do.

148 Neb. 543, 551, 28 N.W.2d 206, 210 (1947). (citations omitted) (emphasis added).

The debtor was an agent of the Bank. As between the debtor and the Bank, the property that was offered for sale was the property of the Bank. The net proceeds of the sale, after the

deduction of the auctioneer commission, advertising and sale expenses, retained its status as property of the Bank. The principal/agent relationship would have continued until the proceeds had been distributed to the Bank. The relationship did not change into a debtor/creditor relationship simply because the debtor did not turn over the sale proceeds to the Bank.

Property of a principal which is entrusted to an agent does not become the property of the agent. In re Estate of Wiley, 150 Neb. 898, 36 N.W.2d 483 (1949). On the date that the proceeds of the sale were deposited in the account of the debtor, the total amount of the funds in the account exceeded the amount of the Bank's proceeds by less than \$500.00. Had the bankruptcy case commenced on that date, almost all of the funds in the account would have represented the gross proceeds from the sale of the Bank's property. The trustee would have been required to turn over the net proceeds of the sale to the Bank. See Natkin & Co. v. Myers, Neb. Bkr. 94:193 (Bankr. D. Neb.), aff'd, 94:760, 762 (D. Neb. 1994).

The problem here is that the debtor paid out all of the proceeds prior to the case being filed. The payments went to the creditors of the debtor and to creditors of Tom Rine, the sole shareholder, officer, and director of debtor. The payments are easily traced, because all but a few hundred dollars in the account during the time of the transfers were the proceeds of the sale. The checking account records of the debtor show exactly who received the payments.

The trustee has filed avoidance suits against most of the recipients of the payments of the proceeds of sale. The parties have stipulated with regard to the other recipients. The Bank wants the Court to order the trustee to turn over to the Bank any amounts the trustee receives from the avoidance actions filed or from payments delivered to the trustee pursuant to settlements prior to any avoidance action being filed.

The trustee argues that, as a matter of statutory construction, the legal basis upon which the trustee can be successful in its avoidance actions and thereby bring property into the estate, is that the property allegedly subject of a preference or fraudulent conveyance action was property of the debtor when transferred. If the property was property of the debtor when transferred, then the property is property of the estate when it is recovered by the trustee. 11 U.S.C. §§ 547(b), 548, & 550. According to the trustee, the property which was transferred by the debtor prepetition and which is recovered by the trustee post petition was property of the debtor, is property of the estate, and cannot be property of a third party such as

the Bank. The Bank can only be the holder of an unsecured claim with regard to the recovered funds.

The Bankruptcy Code at 11 U.S.C. § 547(b) permits the trustee to avoid "any transfer of an interest of the debtor in property" under certain circumstances. The statutory language prior to amendment authorized the trustee to avoid "any transfer of property of the debtor" under certain circumstances. 11 U.S.C. § 547(b) (1978), amended by The Bankruptcy Amendments and Federal Judgeship Act of 1984, 11 U.S.C. § 547(b) (1985). The United States Supreme Court in Begier v. Internal Revenue Service, determined that the current language now mirrors the definition of "property of the estate" in 11 U.S.C. 541(a) as certain "interests of the debtor in property" and that such change was simply for clarification. 496 U.S. 53, 110 S. Ct. 2258, 2263 n. 3, 110 L.Ed.2d 46 (1990). The Supreme Court stated:

We, therefore, read both the older language ("property of the debtor") and the current language ("an interest of the debtor in property") as coextensive with "interests of the debtor in property" as that term is used in Section 541(a)(1).

Begier, 110 S. Ct. at 2263 n.3.

In an early interpretation of the 1978 Bankruptcy Code, the Court of Appeals for the Eighth Circuit held that the broad definition of property of the estate in 11 U.S.C. § 541(a) included a mere possessory interest in grain, the ownership of which was hotly contested. Missouri v. United States Bankruptcy Court for the E. Dist. of Arkansas, 647 F.2d 768 (8th Cir. 1981). The court stated,

On the record before us, the debtors' interest in the Missouri grain consists of possession and a minute ownership interest. In light of the broad definition of property under section 541 of the Code, these interests in the grain are sufficient to trigger preliminary jurisdiction over the property in the bankruptcy court. (citations omitted) Of course, the bankruptcy court must make the final determination of property interests after full presentation of the evidence.

Although we hold that the bankruptcy court has preliminary jurisdiction over the property, we

emphasize that the bankruptcy court must administer the debtors' limited interest consistent with the ownership rights of the holders of documents of title under Missouri law or, in the case of Arkansas Grain Co., under Arkansas law.

Id. at 774 (citations omitted).

Similarly, in this case, had the proceeds of the auction sale been in the possession of debtor on the date the bankruptcy case commenced, the proceeds would have been property of the estate for the limited purpose of determining true ownership rights. Pursuant to the contractual arrangement between the Bank and the debtor, a portion of the gross proceeds, representing the commission due to the debtor for conducting the auction, any advertising expenses and other expenses of sale, would have been property of the estate to be administered for the benefit of unsecured creditors. The balance of the proceeds, although initially determined to be property of the estate pending a determination of actual ownership, would, after review of the rights of various parties, have necessarily been determined to be property of the Bank. The trustee would have been required, as in Natkin, above, to turn over the net proceeds to the Bank.

Since property of the estate includes possessory interests as of case commencement, and since, prior to the commencement of this case, the debtor had an undivided, undistributed ownership interest in a portion of the gross proceeds of the sale, and a possessory interest in the balance of the proceeds pursuant to the terms of the contract between the parties, any prepetition payment of the proceeds to third parties was a "transfer of an interest in property by the debtor" within ninety days of the commencement of the case. The recovery of such transferred property simply puts the trustee, as representative of the estate, in the same position the debtor would have been in had transfers not taken place prior to the commencement of the case.

There are numerous cases which hold that a creditor with a security interest in property of the debtor which was transferred prepetition and then brought into the estate by a trustee avoidance action retains the security interest when the trustee obtains possession. See In re Figearo, 79 B.R. 914 (Bankr. D. Nev. 1987); Official Unsecured Creditors' Comm. v. The N. Trust Co. (In re Ellingsen MacLean Oil Co., Inc.), 98 B.R. 284 (Bankr. W.D. Mich. 1989); In re Cambria Clover Mercantile Co., Inc., 51 B.R. 983 (Bankr. E.D. Pa. 1985); Mitchell v. Rock Hill Nat'l. Bank (In re Mid-Atlantic Piping Prod. of Charlotte, Inc.), 24 B.R. 314 (Bankr. W.D.N.C. 1982); ITT Commercial Fin. Corp. v.

Cullen (In re Antinarelli Enters., Inc.), 107 B.R. 410, (D. Mass. 1989); Claussen Concrete Co. v. Wilken (In re Lively), 74 B.R. 238 (S.D. Ga. 1987). It would be a strange result if a creditor with a security interest in proceeds retained its lien on property obtained by a trustee through an avoidance action, but a true owner lost its ownership rights under the same circumstances.

Decision

The trustee, as a representative of the estate, has the right and the duty to attempt to avoid the transfers which fall under the avoidance provisions of 11 U.S.C. §§ 547(b), 548, and 544. Once funds are recovered, under 11 U.S.C. § 550, or otherwise, it is the duty of the trustee to turn over to the Bank an amount which represents net proceeds of the sale after reducing such proceeds by the earned commission and other expenses of sale, and after reducing such proceeds by an amount representing reasonable fees and expenses of the trustee which were necessarily incurred in avoiding the transfers and in recovering the property for the benefit of the estate and the Bank.

The Bank brought this adversary proceeding to obtain a judgment impressing its interest on proceeds recovered by the trustee in specific avoidance actions or pursuant to specific stipulations, all of which is recited in the agreed statement of facts listed above. The Court finds in favor of the Bank and against the trustee and shall impress the Bank's ownership interest, on a net basis, against such proceeds as they are received by the trustee. The trustee is ordered to account to the Bank in conformance with this memorandum.

Separate journal entry shall be filed.

DATED: February 16, 1995.

BY THE COURT:

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

Copies faxed by the Court to:

CRAWFORD, DAVID/CURZON, CHRIS 493-7005

Copies mailed by the Court to:

Carl J. Sjulín, 1201 Lincoln Mall, Suite 102, Lincoln, NE
68508
United States Trustee

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
)	
RINE & RINE AUCTIONEERS, INC.,	)	CASE NO. BK92-80770
	)	A94-8016
<u>DEBTOR(S)</u>)	
)	
WEST GATE BANK,	)	CH. 7
Plaintiff(s)	)	Filing No.
vs.	)	<u>JOURNAL ENTRY</u>
)	
RICHARD D. MYERS, TRUSTEE,)	
	)	DATE: February 16, 1995
<u>Defendant(s)</u>	)	HEARING DATE: December
	)	6, 1994

Before a United States Bankruptcy Judge for the District of
Nebraska regarding Adversary Complaint

APPEARANCES

David Crawford and Chris Curzon, Attorneys for Trustee
Carl Sjulín, Attorney for West Gate Bank

IT IS ORDERED:

The Court finds in favor of the Bank and against the trustee
and shall impress the Bank's ownership interest, on a net basis,
against such proceeds as they are received by the trustee. The
trustee is ordered to account to the Bank in conformance with the
memorandum entered this date.

BY THE COURT:

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

Copies faxed by the Court to:
CRAWFORD, DAVID/CURZON, CHRIS 493-7005

Copies mailed by the Court to:
Carl J. Sjulín, 1201 Lincoln Mall, Suite 102, Lincoln, NE
68508
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.