

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF

MICHAEL LESLIE LOWE and
GAIL MARIE LOWE

DEBTORS

ALLIANCE NATIONAL BANK AND
TRUST COMPANY,

Plaintiff

vs.

MICHAEL LESLIE LOWE,

Defendant

CASE NO. BK85-1778

A86-319

MEMORANDUM OPINION

On February 3, 1987, trial was held on this adversary proceeding commenced by Alliance National Bank and Trust Company (Bank) to determine the validity priority and extent of a lien. Albert Reddish and Mark Anderson of Alliance, Nebraska, appeared on behalf of the bank. David Nuttleman of Gering, Nebraska, appeared on behalf of the debtor/defendant.

Findings of Fact

1. Defendant and spouse filed a voluntary Chapter 7 petition on August 8, 1985.

2. Defendant operated a business variously entitled "Record Shop" and "Sound Outlet" in various western Nebraska cities and borrowed operating funds for the business from the Bank. See Memorandum Opinion filed this date in Adversary No. A85-291 which outlines the facts concerning the business relationship between the parties.

3. While defendant was operating the business as a sole proprietorship he executed several promissory notes to the Bank and obtained loans, extensions and renewals of his line of credit.

4. Before going into the business the defendant had been an employee of the Union Pacific Railroad Co. and was injured while on the job. In June of 1982 he made a settlement with the railroad by which he received a lump sum of cash which covered his attorney fees and medical expenses and the railroad contracted to pay him \$500 per month for life with certain guarantees concerning the minimum number of years that the payments would be made.

5. The settlement agreement between the defendant and the railroad contained the following language: "No amount payable or to become payable under the terms of this Agreement shall be subject to anticipation or assignment by Lowe or any other beneficiary thereof, or to attachment by or to the interference or control of any creditor of any beneficiary, or to be taken or reached by any legal or equitable process in satisfaction of any debt or liability of a beneficiary prior to its actual receipt by the beneficiary".

6. The defendant is required to perform no further duties in order to receive the payments and the only duty of the railroad is to make the payments.

7. During the business relationship between the Bank and defendant, defendant informed the Bank on a regular basis of the status of his claim against the railroad and the anticipated settlement. On at least one occasion, May 20, 1983, the evidence, as reflected in a bank officer's notes, Exhibit 121, shows that the Bank extended financing by rewriting a \$14,000 note and advancing \$6,000 of new money with the agreement by the defendant to make payments on a monthly basis and, as additional security to assign the railroad settlement to the Bank.

8. Also, on March 14, 1984, defendant executed a new note reflecting a renewal of previous obligations and advancing additional funds and took as security another assignment of the money due and to become due from the railroad settlement.

9. On June 20, 1985, defendant executed an additional note once again granting assignment, for security purposes, of the money due from the railroad.

10. The documents representing the assignments of defendant's interest in the railroad money, for security purposes, was filed with the appropriate county clerk on August 1, 1985, and with the Nebraska Secretary of State on August 7, 1985.

11. All other assets of the debtor/defendant have been liquidated and there remains a deficiency due to the Bank which this Court has found by separate memorandum agreement of this date in Adversary No. A85-291 to be nondischargeable.

12. In a case brought by the Chapter 7 trustee as an objection to exemption and decided on May 21, 1986, this Court determined that the railroad payment was an annuity and, as between the trustee and the debtor, was exempt pursuant to the provisions of Section 44-371 R.R.S. Neb. That statutory section provides that an annuity is exempt unless it has been assigned. Upon motion to reconsider filed by the trustee, the Court found that the assignment, if any, was not an assignment to the trustee and the trustee, therefore, could not object to the exemption.

13. The Bank claims an interest in the settlement funds by virtue of the assignments it has received from the debtor and claims that the funds are not exempt pursuant to Section 44-371 R.R.S. because, prior to bankruptcy, the debtor assigned, for security, his interest to the Bank.

Conclusions of Law

Although the debtor claims that the specific language of the settlement agreement with the railroad prohibits defendant from assigning his interest to any creditor, he nonetheless did so. As consideration for the Bank granting certain loans, the defendant executed, on more than one occasion, an assignment of his interest in the railroad payments.

The Nebraska exemption statute, Section 44-371 R.R.S. provides that an annuity is not exempt if it has been previously assigned.

The issue before the Court is not whether the creditor will be successful in attempts to garnish, attach or execute upon the railroad and obtain the funds directly from the railroad. The railroad may have a very valid defense to any garnishment or attachment request. The issue is whether or not, as between the Bank and the debtor, the funds represented by the settlement agreement are exempt under Nebraska law and, therefore, exempt under the Bankruptcy Code. The exemption decision rests upon a determination of the validity of the assignment.

Debtor suggests that an annuity, by definition, is simply a right of the debtor to receive specific monthly payments. According to the debtor, he has no interest in the payments until he receives them. Therefore, the only thing that the debtor could assign, if assignment were authorized, is his right to receive the monthly payment. According to the debtor, then such an assignment constitutes a contract to turn over each monthly payment as it is paid to him and such a contract would now be unenforceable by virtue of the filing of the Chapter 7 bankruptcy. Debtor further argues that under an annuity contract there is no "fund" in which the debtor has rights and which could be assigned or the subject of an assignment. See: the Matter of Young, 806 F.2d 1303 (5th Cir. 1986).

However, to accept the logic of the debtor's argument, the Court would have to intentionally overlook the language of the Nebraska Statute. It provides that an annuity is exempt unless it has been assigned. (Emphasis added). This must mean that the Nebraska Legislature concluded that the beneficiary of an annuity contract had rights, either to payment or to a fund, and concluded that such beneficiary could assign those rights. This Court will not ignore the plain language of the Nebraska Statute.

In addition, the debtor argues that the monthly payments due the debtor represent property not in existence on the date the bankruptcy petition was filed and, therefore, such payments are not property of the estate and, if there was a prepetition security interest granted in such rights, such security interest is cut off by the provisions of Section 552(a) of the Bankruptcy Code. This Court has previously found that the rights of the debtor under the terms of the settlement agreement with the railroad are property of the estate within the meaning of 11 U.S.C. § 541. That conclusion was one of the results of the Memorandum Opinion of May 21, 1986, and such decision has not appealed by either party. That finding also precludes the application of the lien cutoff provisions of Section 552(a) and this Court concludes, therefore, that if the creditor does have a perfected security interest in the annuity by virtue of the assignment, the security interest is not cut off by the filing of the bankruptcy petition.

Next the debtor argues that even if the Bank has a perfected security interest in the annuity, the debtor has a right to avoid that security interest as a preferential transfer since the perfecting documents were not filed pursuant to the Nebraska Uniform Code until approximately one week before the bankruptcy petition was filed. Therefore, the debtor argues that pursuant to 11 U.S.C. §522(h) the debtor may avoid such a transfer made within 90 days of the date of the filing of the bankruptcy petition if the trustee could have avoided such transfer and the trustee fails to do so. This issue was not urged to the Court during the trial and it is not an issue before the Court at this time. It has been raised in the brief of the debtor, but no action to set aside a preferential transfer has been filed and the Court will limit this opinion to the issue actually presented and litigated. That issue is whether or not debtor's rights in the annuity are exempt under the Nebraska Statutes or whether such exemption has been waived by assignment of such rights.

The exact language of the Nebraska Statute at issue is:

Section 44-371, Neb. Rev. Stat., 1984, :
annuity contract, insurance proceeds and
benefits; exempt from claims of creditors;
exception. All proceeds, cash values, and
benefits accruing under any annuity contract,
. . . shall be exempt from attachment,

garnishment, or other legal or equitable process, and from all claims of creditors of the insured, and of the beneficiary if related to the insured by blood or marriage, unless a written assignment to the contrary has been obtained by the claimant.

Debtor made two express assignments of the contract, one on May 20, 1983, (Exhibit 32) and the other on March 14, 1984, (Exhibit 56).

The applicable language of the assignment is the following:

"This Assignment is made as security for the payment of any and all past, present and future indebtedness of every kind and nature owed and/or owing by Assignor to Assignee that is past due, currently due or which hereafter becomes due, and Assignee hereby agrees that, when all of aforesaid indebtedness owed or owing by Assignor to Assignee shall be fully paid, it will, at the request of Assignor, reassign all monies covered by this Assignment to Assignor. Until such request and re-assignment is made, this Assignment shall be irrevocable and this Assignment shall be security for any indebtedness accruing in the future. Even though a period shall intervene when there is no indebtedness existing from the Assignor to Assignee."

Further, the document states:

"Instrument is in full force and effect, that Instrument creates valid and existing obligations owed to Assignor, that Assignor has not heretofore assigned (absolutely or for security), pledged, encumbered or otherwise hypothecated any of his rights, title or interest in the Instrument, that Assignor is not in default in connection with the Instrument, that there are no offsets or claims against Assignor's right, title, or interest in the Instrument."

This Court concludes as a matter of law that the debtor by executing the document did assign to the Bank all of his rights in the settlement payments, the "annuity". The Bank filed the assignment document with the appropriate county and state offices as a security agreement and financing statement. Debtor urges the Court to find that the document does not satisfy the requirements of the Nebraska Uniform Commercial Code for a financing statement or a security agreement. This Court declines to adopt the

argument of the debtor and does find that the document satisfies the requirements of Section 9-203 of the Nebraska Uniform Commercial Code that it is a security agreement because it does grant an interest in personal property to the Bank, it is in writing, it contains the debtor's signature and a description of the collateral. In addition, it meets the requirements of a financing statement under Section 9-402 of the Nebraska Uniform Commercial Code and that it gives the name of the debtor, the name of the secured party, the address of the secured party and a description of the collateral. It does not give the address of the debtor, but this Court finds that such an omission is not seriously misleading. Therefore, the assignment has been properly perfected as a security interest.

The above comments concerning the perfection of the assignment as a security interest are included in this opinion only because the issue has been raised by the parties. This Court does not feel that the Uniform Commercial Code filing or perfection is even necessary for the Court to determine the issue of the exempt status of the annuity.

Finally, the debtor argues that because of the specific language in the settlement agreement between the debtor and the railroad prohibiting the debtor from assigning his rights under the agreement, the assignment is not enforceable by the Bank unless the railroad agrees to the assignment. Since there is no evidence before the Court that the railroad has agreed to the assignment, the debtor argues that the assignment is not valid, is not enforceable and urges the Court to conclude that it is, therefore, not an "assignment" under the Nebraska Statute which would remove the annuity from the exempt status. The debtor cites the Nebraska Supreme Court case of First National Bank of Wayne vs. Gross Real Estate Co., 162 Neb. 343, 75 N.W.2d 704 (1956). However, this court does not feel that the First National Bank of Wayne case is applicable to the facts of this case. In Wayne, the Court considered the question of whether an assignee of a portion of an amount due under a contract could enforce a claim against the debtor without debtor's acceptance of said assignment. The Supreme Court of Nebraska held:

"That the debtor has a right to stand upon the contract with his creditor and pay the debt as a whole; that a creditor should not be allowed to divide an obligation due him into fragments and assign them to a number or persons, thereby subjecting his debtor to the annoyance of more than one claim; and that a debtor may not be put to the possibility of defending several lawsuits growing out of a single debt to a creditor."

In this case Mr. Lowe may be correct that the Bank will be unable to enforce the assignment directly against the railroad. The railroad has not consented to the assignment and has entered into a written settlement which prohibits assignment by the debtor. However, as stated earlier, collection is not the issue. The issue is whether or not the debtor has assigned his interest in an annuity which removes the annuity from an exempt status under the Nebraska Statutes.

This debtor voluntarily transferred his interest in the settlement with the railroad in consideration of a receipt of new money from the Bank. He transferred such interest on more than one occasion and received monetary consideration for such transfer. He now claims that the transfer was void and that even though he borrowed the money in good faith and with the intent to pay it back and assigned his interest in the settlement agreement in good faith, the Bank should not be permitted to depend upon such assignment and he should be permitted to treat the settlement as an annuity which is exempt from garnishment or attachment by the Bank.

This Court concludes that as between this debtor and this creditor the assignment is a valid transfer of the debtor's interest in all aspects of the settlement agreement with the railroad. This Court further concludes, as a matter of law, that the "Assignment" executed by the debtor is an assignment which removes the asset from exempt status under the Nebraska Statute.

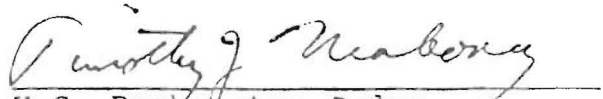
This Court makes no ruling concerning the enforceability of the terms of the assignment against the railroad. The judgment of the Court is that the proceeds of the settlement with the railroad are not exempt under Nebraska law and that the Bank has a valid interest in such proceeds.

Since this issue has been the subject of litigation from shortly after the date of the bankruptcy filing until this date, the debtor had a right to receive and use the proceeds of the settlement agreement until this final opinion on their exempt status was issued. However, proceeds of the settlement agreement received from the date of this opinion forward are not exempt.

Separate Journal Entry shall issue.

DATED: May 18, 1987.

BY THE COURT:


U.S. Bankruptcy Judge

Copies to:

A.T. Reddish, Attorney, P.O. Box 827, Alliance, NE 69301
David C. Nuttleman, Attorney, Box 340, Gering, NE 69341-0340
Mark Andersen, Attorney, P.O. Drawer E, Alliance, NE 69301