UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
RAYMOND E. NORRIS and BARBARA B. NORRIS,	)	CASE NO. BK84-2287
	)	
DEBTORS	)	A85-208
	)	
FARMERS STATE BANK OF SUPERIOR, NEBRASKA,	)	Chapter 11
	)	
Plaintiff	)	
	)	
vs.	)	
	)	
RAYMOND E. NORRIS and BARBARA B. NORRIS and the UNITED STATES OF AMERICA,	)	
	)	
Defendants	)	

MEMORANDUM OPINION

This matter came on for a hearing on January 8, 1986, in Lincoln, Nebraska, upon the Motion to Dismiss filed by the United States of America, acting through the Internal Revenue Service. The plaintiff, Farmers State Bank of Superior, Nebraska, was represented by Robert F. Craig, of Kennedy, Holland, DeLacy and Svoboda, Omaha, Nebraska. The defendants/debtors, Raymond E. Norris and Barbara B. Norris, did not appear in person or by counsel. The defendant, United States of America, (IRS), was represented by Peter V. Taylor, Tax Division, United States Department of Justice, Washington, D.C. The plaintiff had filed a brief in opposition to the Motion to Dismiss prior to this hearing. The Government requested additional time to file a responsive brief in addition to the Memorandum it had previously filed with its Motion to Dismiss. The Court, having considered the arguments and briefs of counsel, now renders its decision.

Statement of Facts

The defendants, Raymond and Barbara Norris, are debtors-in-possession and filed their Chapter 11 petition on November 21, 1984. The plaintiff, Farmers State Bank, is a State bank authorized to do business in the State of Nebraska with its principal place of business in Superior, Nebraska. The plaintiff

is also the holder of an allowed secured claim in excess of $190,000 evidenced by promissory notes, a security agreement and financing statement in all of the debtor's inventory, accounts receivable and the proceeds thereof.

Subsequent to the filing of this Chapter 11 proceeding and without authorization from the Court or permission of the Bank, the defendant, Norris, paid the Internal Revenue Service the following amounts:

date	amount
November 27, 1984	$8,999.47
December 12, 1984	798.00
January 25, 1985	306.03
TOTAL	$10,103.50

The Bank claims such amounts are cash collateral in which it has an interest superior to that of the IRS and has made demand upon the defendants to return the cash collateral but the IRS refuses to do so. The IRS has not filed a proof of claim in the bankruptcy case.

On September 10, 1985, the plaintiff filed a complaint against the debtors-in-possession and the IRS alleging a conversion of the plaintiff's cash collateral. In the prayer the plaintiff asks the Court for an order finding that the defendants have converted property of the plaintiff and for an order entering judgment against the defendants for said conversion in the amount of $10,103.50 plus costs and attorney's fees as provided in 26 U.S.C. §7430(a), §7430(b)(1).

The IRS filed its Motion to Dismiss the adversary proceeding upon two grounds: first, that the doctrine of sovereign immunity protects it from this action and second, that the plaintiff lacks standing to bring the action.

Issue

Does the plaintiff have standing to initiate this action for conversion even though it is neither the debtor nor the trustee?

Decision

Plaintiff lacks standing and, therefore, the Government's Motion to Dismiss is granted.

Conclusions of Law and Discussion

The Government argues that this action should be dismissed against it because the plaintiff lacks standing to commence this action. The United States asserts that this is essentially an action to set aside a post-petition transfer as governed by

11 U.S.C. §549(a) of the Bankruptcy Code. Matter of Isis Foods, Inc., 37 B.R. 334, 332 (W.D. Mo. 1984). As such, the Government contends that only the trustee or the debtor-in-possession has standing to bring such actions under §549. In re Ciavarella, 28 B.R. 823, (Bkcy. S.D. N.Y. 1983), In re Lunsford, 12 B.R. 762, (Bkcy. M.D. Ala. 1981).

The plaintiff alleges that this is not an action by a trustee pursuant to §549 but rather is an action involving the competing claims of debtor and two creditors to property of the estate over which the Court has jurisdiction and which one creditor has an affirmative responsibility to turn over to the estate. The plaintiff alleges in its pleadings that it has a security interest in all of the debtor's inventory, accounts receivable and the proceeds thereof and that after the filing of this Chapter 11 proceeding that the debtor transferred to the IRS amounts from the cash collateral which were subject to the security interest of the plaintiff.

Support for the position that third parties may bring actions such as this one against the Government is found in the case of In re Major Dynamics, Inc., 14 B.R. 969, (Bkrtcy. S.D. Cal. 1981). In that case, the Official Creditors' Committee had filed a motion for temporary stay of IRS audits, assessments and collection actions which were initiated against the debtor's various investors who were also unsecured creditors of the debtor. The Court concluded that the Bankruptcy Court had jurisdiction to determine disputes between third-party creditors and the IRS in an appropriate case. However, the Court declined to exercise its jurisdiction to enjoin the IRS upon the factual circumstances presented because the potential interference with the debtor's rehabilitation was too speculative to justify such a remedy.

However, the factual situation in Major Dynamics is different from this case. Unlike Major Dynamics, there are no allegations that here the IRS is auditing or otherwise pursuing the plaintiff.

Although the complaint alleges plaintiff's property was converted by defendants and does not allege any statutory grounds for the action, upon comparison of the language of the complaint to the language of 11 U.S.C. §549(a), it is clear to the Court that plaintiffs' action is one to avoid a post-petition transfer. Such action can only be brought by a trustee or debtors-in-possession. Such a result, although required by the language of the statute, is not equitable. If the allegations of the complaint are accepted as true for the purposes of this motion, then the result of this decision is that a debtor-in-possession can make payments to a governmental agency and pay from cash collateral any obligation to that government agency. This result may be nice for the debtor and the Government, but it certainly does not comport with the overall scheme of the Bankruptcy Code which requires the United States Government and its agencies to recognize and remain subordinate to perfected security interests.

A creditor harmed by the alleged self dealing by a debtor-in-possession can move for the appointment of a trustee under 11 U.S.C. §1104 and the trustee, if appointed, can certainly bring this action.

With regard to the sovereign immunity argument advanced by the Government, because the decision can be and has been made upon the "standing" issue, no determination need be made concerning sovereign immunity. If the trustee were bringing this action, rather than a third party, a sovereign immunity defense would not be available. See In re Lunsford, 12 B.R. 762 (Bankr. M.D. Ala. 1981).

Under the present posture of this case, the Motion to Dismiss is granted as against the Government.

Separate Journal Entry will be entered.

DATED: May 27, 1986.

BY THE COURT:

Timothy J. Mahoney
U.S. Bankruptcy Judge

Copies to:

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Peter V. Taylor, Tax Division, United States Department of Justice, Washington, D.C. 20530