

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

In Re: CARMEN HANKS O'DELL,
Debtor

Chapter 13
Case No. 7-04-3415

DECISION AND O R D E R

At Roanoke in said District this 8th day of March, 2005:

On August 18, 2004, the debtor filed a petition for chapter 13 relief. On November 10, 2004, a hearing was held on Dr. Donald L. Martin's, objection to the Order Staying Levy or Garnishment decreed on August 20, 2004. Brenda Martin appeared on behalf of Dr. Martin, and the debtor appeared by counsel. Ms. Martin gave oral testimony as to the nature of the garnishment decree of the circuit court, arguing that the garnishment was effected outside of 90 days of the filing of the petition. The debtor, by counsel, moved in court for the return of the garnished wages arguing that (1) Dr. Martin's objection was barred as untimely because it was filed more than ten (10) days beyond the filing date of the order, (2) that the lien arising by writ of fieri facias imposed upon statutory exemptions to which the debtor would be entitled, and (3) that the garnished wages constitute preferential payments to a creditor, either for the wages actually withheld within the 90 days pre-petition, or for the garnishment in total because the return date of the writ of fieri facias of October 13, 2004, would occur post-petition. The debtor also offered exhibits of earnings statements indicating gross pay and deductions of the debtor over the relevant period at issue. Having considered

the motions, pleadings, evidence, and arguments made at the hearing, the court is prepared to resolve Dr. Martin's objection to the Order Staying Levy or Garnishment. For the reasons set forth below, the court will deny Dr. Martin's objection and grant the Debtor's motion to avoid the lien and retrieve the garnished funds as property exempted from the bankruptcy estate.

FACTS

On April 12, 2004, the Pulaski General District Court issued a garnishment summons in favor of Dr. Martin in the amount of \$1,125.00 for judgment and costs of unpaid dental services rendered to the debtor. The summons was issued to the debtor's employer, Global Contact Services, commanding Global to withhold money owed to the debtor, in this case as wages earned, but not paid, by the debtor. The summons contained a Writ of Fieri Facias, commanding the Sheriff to levy upon the property of the debtor and make the return to the clerk's office within 180 days. The Pulaski Court set a return date on the summons for October 13, 2004, at which time Global was to have paid the garnished earnings to the court, or appear before it and explain why it had not complied.¹ Global cumulatively withheld approximately \$964.60 from the debtor's earnings between May 2, 2004 and July 2, 2004.² Ms. O'Dell left the employ of Global before the entire judgment

¹See Motion to Quash Garnishment with Summons Attached. This is logically the earliest date that an order to the garnishee to pay the funds to the court or the judgment creditor would be issued if the funds were still held by the garnishee.

²See Debtor's Exhibit 1 for handwritten figures indicating: (1) 194.86 withheld on May 7, 2004; (2) \$192.44 withheld on May 21, 2004; (3) \$192.43 withheld on June 4, 2004; (4) \$192.43 withheld on June 18, 2004; and (5) \$192.44 withheld on July 2, 2004.

was withheld from her earnings. There is no evidence that wages were garnished beyond the petition date, and the evidence indicates that Global retains possession of the funds.

On August 18, 2004, the debtor filed a voluntary petition for chapter 13 relief. The debtor included Dr. Martin on Schedule F, Creditors Holding Unsecured Nonpriority Claims, and Dr. Martin filed a proof of claim for \$1,125.00 on August 27, 2004. On August 18, 2004, the debtor filed a Motion to Quash Garnishment or Levy, and this Court entered an order granting the motion on August 20, 2004. On October 21, 2004, the Court received a letter from Dr. Martin objecting to the Motion to Quash Garnishment, stating that the garnishment was issued outside of the 90 day period claimed in the motion. On November 10, 2004, a status hearing was held on the objection to the motion to quash the garnishment, at which time the debtor appeared by counsel, and Brenda Martin, the creditor's representative, appeared on behalf of Dr. Martin. Following argument by debtor's counsel and Ms. Martin as enumerated above, the matter was taken under advisement.

LAW AND ANALYSIS

Pursuant to 11 U.S.C. § 362 (a)(2), the filing of a Chapter 13 bankruptcy petition stays the enforcement of judgments against the debtor, including levy and execution, arising from a prepetition judgment, which is directed either against property of the estate, or property of the debtor. 3 COLLIER ON BANKRUPTCY ¶ 362.03[4] (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev.). The stay is not limited to property under control of the court, but it also applies to property of the estate in possession of third parties, including garnishment of an employee's wages. *Id.* By all accounts, the employer properly halted enforcement of the garnishment levy following the debtor's filing of her chapter 13 petition

before the total original amount due of \$1,125.00 on the garnishment summons was collected. *See* Debtor's Ex. 1 (showing the last garnishment occurred on July 2, 2004, and the total amount collected sums to \$964.60.) The former employer, Global Contact Services, retains possession of the collected funds, which follows, since any officer charged by the writ of fieri facias on the summons is constrained from making a return by the automatic stay on levy and execution of the writ. *See* 11. U.S.C. § 362(a)(1)-(6).

At the hearing on the objection to order to quash the garnishment, debtor's counsel argued for a return of the collected funds based on a preference theory to recover funds paid to a particular creditor during the presumptive insolvency period of 90 days. An action to recover a preference must be brought as an adversary proceeding according to Rule 7001(1).³ *See, e.g., Sheaffer v. Marshall Nat'l Bank & Trust Co. (In re Sheaffer)*, 159 B.R. 758, n.1 (Bankr. E.D. Va. 1993). The preference avoidance argument before the Court was first raised by the motion to quash the garnishment, which represents a contested matter,

³ [Federal Rules of Bankruptcy Procedure]

Rule 7001. Scope of Rules of Part VII

An adversary proceeding is governed by the rules of this Part VII. The following are adversary proceedings:

- (1) a proceeding to recover money or property, other than a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under § 554(b) or § 725 of the Code, Rule 2017, or Rule 6002;
- (2) a proceeding to determine the validity, priority, or extent of a lien or other interest in property, other than a proceeding under Rule 4003(d);
- (3) a proceeding to obtain approval under § 363(h) for the sale of both the interest of the estate and of a co-owner in property;
- (4) a proceeding to object to or revoke a discharge;
- (5) a proceeding to revoke an order of confirmation of a chapter 11, chapter 12, or chapter 13 plan;
- (6) a proceeding to determine the dischargeability of a debt;
- (7) a proceeding to obtain an injunction or other equitable relief, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for the relief;
- (8) a proceeding to subordinate any allowed claim or interest, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for subordination;
- (9) a proceeding to obtain a declaratory judgment relating to any of the foregoing; or
- (10) a proceeding to determine a claim or cause of action removed under 28 U.S.C. § 1452.

but not an adversary proceeding. The filing of a proof of claim in the case by the creditor does not commence an adversary proceeding, either. Further, the preferential transfer argument raised by the debtor pertains to 11 U.S.C. § 547, which section is not one of the listed exceptions to the adversary proceeding requirement for the recovery of money of the debtor under Rule 7001. Thus, a recovery argument strictly under § 547 would be procedurally, and fatally, flawed if raised without the filing of an adversary proceeding.

A successful prosecution of a § 547(b) preference avoidance action requires proof of all the listed elements⁴. The current preference avoidance theory lacks proof of two elements, (1) that the initial transfer of the interest of the debtor in property occurred while the debtor was insolvent, and (2) that the trustee abandoned pursuit of the property as part of the bankruptcy estate. Under Virginia law, execution of a writ of fieri facias fixes a lien on intangible property from the date the writ is delivered to the officer charged with serving it. Va. Code Ann. § 8.01-501. See also In re Hughson, 74 B.R. 438, 440 (Bankr. W.D. Va.1987) (holding that fixing of lien by writ of fieri facias establishes the initial transfer of interest of debtor in property where wages were garnished and paid to judgement creditor prior to filing of petition). Here, the execution of the writ of fieri facias occurred on April

⁴ § 547. Preferences *** (b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property--

- (1) to or for the benefit of a creditor;
- (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
- (3) made while the debtor was insolvent;
- (4) made--
 - (A) on or within 90 days before the date of the filing of the petition; or
 - (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
- (5) that enables such creditor to receive more than such creditor would receive if--
 - (A) the case were a case under chapter 7 of this title [11 USCS §§ 701 et seq.];
 - (B) the transfer had not been made; and
 - (C) such creditor received payment of such debt to the extent provided by the provisions of this title [11 USCS §§ 101 et seq.].

12, 2004, and the chapter 13 petition was filed on August 18, 2004, which puts the initial transfer without the 90-day rebuttable presumption of insolvency. *See* 11. U.S.C. § 547(f). Thus, the debtor would have to prove her own insolvency before being allowed to recover the preference.

Also, in prosecuting a § 547 avoidance of a preferential transfer, the trustee must have abandoned the interest of the debtor in property as belonging to the bankruptcy estate. Under § 547(b), it is the trustee alone who has the power to avoid preferential transfers, and any interests in property avoided by the trustee become property of the estate. 5 COLLIER ON BANKRUPTCY ¶ 547.10 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev.). . However, a debtor may avoid any transfer of property pursuant to 11. U.S.C. § 522(h)⁵. Here, the debtor may not proceed under § 547, per se, to avoid a preferential transfer, but may use § 522(h) to avoid a preferential transfer, but she must carry the same burden which would be upon the trustee to prove of all the elements of a § 547 preference avoidance action in an adversarial proceeding.

In contrast to a preference avoidance, an individual debtor has the power under § 522(f) to avoid the fixing of a lien on an interest of the debtor in property to the extent the lien impairs an exemption to which the debtor would otherwise be entitled.⁶ *See e.g.*,

⁵ 11 U.S.C. § 522(h) The debtor may avoid a transfer of property of the debtor or recover a setoff to the extent that the debtor could have exempted such property under subsection (g)(1) of this section if the trustee had avoided such transfer, if--

(1) such transfer is avoidable by the trustee under section 544, 545, 547, 548, 549, or 724(a) of this title [11 USCS § 544, 545, 547, 548, 549, or 724(a)] or recoverable by the trustee under section 553 of this title [11 USCS § 553]; and

(2) the trustee does not attempt to avoid such transfer.

⁶ 11 U.S.C. § 522(f)(1)(A) (2005) Notwithstanding any waiver of exemptions but subject to paragraph (3), the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of

In re Shearer, 132 B.R. 313 (Bankr. W.D. Va. 1991). Unlike the procedural requirements for a § 547 preference avoidance action, the procedure for avoiding a lien under § 522(f) does not require the filing of an adversary proceeding. The motion to avoid a lien is made as a contested matter pursuant to Rule 4003(d) and Rule 9014⁷. The lien is avoided only to the extent that it impairs the hypothetical exemption⁸. 5 COLLIER ON BANKRUPTCY ¶ 522.11[3] (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev.). Here, the debtor moved to quash the garnishment as a contested matter, and her argument implies an improper obstruction to the full use of her homestead exemption. The debtor listed \$964.60 in garnished wages as exempt property in her “Schedule C - Property Claimed as Exempt” table as part of her allowable homestead exemption available under Va. Code. Ann. § 34-4⁹. Importantly, the debtor filed her petition before the garnishment summons return date, before the employer turned the money over to the judgment creditor or the garnishment court, and before the garnishment court had entered an order to the garnishee to pay the money to the judgment creditor or the court. Because Virginia’s homestead exemption can

this section, if such lien is a judicial lien . . .

⁷ Fed. R. Bankr. P. 4003(d). A proceeding by the debtor to avoid a lien or other transfer of property exempt under § 522(f) of the Code shall be by motion in accordance with Rule 9014 (relief in contested matters requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought).

⁸ Virginia has “opted-out” of the federal exemptions available under § 522(b), and debtors in Virginia districts should look to Virginia Code for appropriate exemption statutes.

⁹ Debtor listed five items as exempt on Schedule C under her homestead exemption, which totaled to \$2,574.60. Va. Code Ann. § 34-4 (2004) sets the homestead exemption limit at \$5,000.00 for debtors without dependants. See Smith v. Holland, 124 Va. 663,666 (1919) (holding that the statute section 3642 [now codified at Va. Code. Ann § 34-17], permits a debtor to set apart his qualified homestead property at any time before the same is subject to sale, or otherwise, under judgment, decree, order, execution or other legal process).

“trump” the lien from the writ of fieri facias¹⁰ before the court orders the garnishee to make payment to the judgment creditor or the garnishee pays the withheld funds to the court, the debtor still maintains an interest in the garnished wages withheld by the garnishee¹¹. This Court finds argument of the debtor persuasive and holds that the debtor shall be entitled to recover the garnished funds in possession of the employer as exempted homestead property pursuant to 11 U.S.C. § 522(f). Having decided the matter for the Debtor as a lien avoidance issue, the Court finds it unnecessary to reach the merits of debtor’s argument of the timeliness of Dr. Martin’s objection to the motion to quash garnishment.

CONCLUSION

The debtor is entitled to avoid the lien of writ of fieri facias pursuant to 11 U.S.C. § 522(f), and the garnished wages shall be returned to the debtor as exempt property under the homestead exemption pursuant to Va. Code Ann. § 34-4. Accordingly, it is

ORDERED:

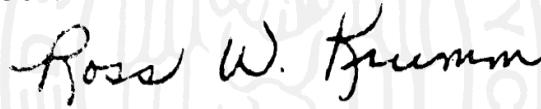
That Carmen O’Dell’s motion to avoid the lien on garnished wages eligible for homestead exemption from the bankruptcy estate is GRANTED. The earned

¹⁰ In re Wilkinson, 196 B.R. 311 (Bankr. E.D. Va. 1996) (holding that a homestead deed may be filed at any time before a court . . . orders the payment of money by the garnishees to the judgment creditor at a hearing of the garnishment proceeding) (quoting Wilson v. Virginia National Bank, 214 Va. 14, 15 (1973)).

¹¹ *Id.* at 317 (stating, however, that the debtor in that case was not entitled to the garnished wages because the return date had already passed at the time of the filing of the petition).

wages garnished in the original amount of \$964.60 shall be returned to the debtor.

Copies of this order are directed to be sent to Debtor's Counsel, Berrell F. Shrader, Esq., 1111-C N. Main St., Blacksburg, VA 24060; Dr. Donald L. Martin, 62 E. Main St., Pulaski VA 24301-5014; and Global Contact Services, 58 N. Washington Ave., Pulaski, VA 24301.



Ross W. Krumm

Ross W. Krumm
U. S. Bankruptcy Judge

