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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED

99 DEC 16 PM 3:06

COURT DISTRICT OF OHIO
CLEVELAND

In re:)	Case No. 99-14306
)	
DEBORAH L. HALISHAK,)	Chapter 13
)	
Debtor.)	Judge Pat E. Morgenstern-Clarren
)	
DEBORAH L. HALISHAK,)	Adversary Proceeding No. 99-1269
)	
Plaintiff,)	
)	
v.)	<u>MEMORANDUM OF OPINION</u>
)	<u>AND ORDER</u>
)	
TUBE CITY, INC.,)	
)	
Defendant.)	

The Debtor brings this adversary proceeding under 11 U.S.C. § 547 to avoid judgment liens filed by Tube City, Inc. ("Tube City"). Tube City moves for judgment on the pleadings on the basis that the Debtor does not have authority to seek the relief requested (the "Motion"). (Docket 9, 11). The Debtor opposes that request and suggests that she has authority under a different section of the Bankruptcy Code. (Docket 10). For the reasons stated below, the Motion is granted.

JURISDICTION

The Court has jurisdiction to hear this matter under 28 U.S.C. § 1334 and General Order No. 84 entered on July 16, 1984 by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(F).

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FACTS

“It is uncontested that on or about March 8, 1999, and within the ninety (90) days preceding the commencement of this case, Tube City filed judgment liens against Debtor’s real property in Cuyahoga County and Huron County, on account of an antecedent debt.” (Joint Pretrial Statement, Docket 5). The Debtor requests avoidance of those liens in their entirety under 11 U.S.C. § 547. (Docket 1).

DISCUSSION

I.

Judgment on the Pleadings

Bankruptcy Rule 7012(b) incorporates Federal Civil Rule 12(c) which provides that “[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.” See Fed. R. Bankr. P. 7012(b) and Fed. R. Civ. P. 12(c). When considering such a motion, a court must:

construe the complaint in the light most favorable to the plaintiff[] . . . and determine whether the plaintiff[] undoubtedly can prove no set of facts in support of the claims that would entitle [her] to relief. [The court must] accept all of Plaintiff[’s] factual allegations as true, but [it] need not accept as true legal conclusions or unwarranted factual inferences.

Mixon v. Ohio, 193 F.3d 389, 400 (6th Cir. 1999) (internal citations omitted).

II.

11 U.S.C. § 547

Section 547(b) provides that “[e]xcept as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property[.]” 11 U.S.C. § 547(b). Under these terms, a trustee is the only party given the authority to request avoidance.

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Bankruptcy Code § 1303 does grant a Chapter 13 debtor certain powers which would otherwise belong to the trustee, but that section does not provide a Chapter 13 debtor with any avoidance powers. Based on the plain meaning of these statutory provisions, a Chapter 13 debtor does not have the authority to request avoidance under § 547. *Hill v. Fidelity Fin. Servs. (In re Hill)*, 152 B.R. 204 (Bankr. S.D. Ohio 1993).

A Chapter 13 debtor may, however, avoid a preferential transfer in limited circumstances under 11 U.S.C. § 522(h). That section states that:

The debtor may avoid a transfer of property of the debtor . . . 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 . . . 547 . . . of this title . . . ; and
- (2) the trustee does not attempt to avoid such transfer.

11 U.S.C. § 522 (h).

III.

The Parties' Arguments

Tube City argues that it is entitled to judgment on the pleadings because the Complaint requests avoidance of its liens under § 547 and the Debtor does not have standing to seek avoidance under that section. The Debtor does not challenge that argument, but takes the position that she can seek avoidance of Tube City's liens under § 522(h). Tube City does not dispute that the Debtor has avoidance powers under § 522; it does, however, point out that the Debtor did not identify that section as a basis for its Complaint and that the liens are only avoidable in part under § 522.

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IV.

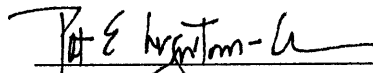
The Complaint

The Complaint requests avoidance of Tube City's liens based solely on § 547 and does not state a cause of action under § 522(h). As the Debtor lacks statutory authority to request avoidance under § 547, judgment on the pleadings is appropriate and will be entered.

Under the circumstances, it is appropriate to grant the Debtor leave to file an amended complaint to request avoidance based on 11 U.S.C. § 522(h). The Debtor may file such an amended complaint on or before **December 30, 1999**. As a result of this leave being given, the final pretrial and trial dates set forth in the Adversary Case Management Scheduling Order are vacated. (Docket 6). A pretrial to reschedule these dates will be held on **February 13, 2000** at 10:15 a.m.

IT IS SO ORDERED.

Date: 16 Dec 1999



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: Mark Schlachet, Esq.
Stephen Cheatham, Esq.
Myron Wasserman, Trustee

By: Joyce L. Gordon, Secretary

Date: 12/16/99