

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

IN RE:)	CASE NO. 00-64101
)	
LINDA BARR,)	CHAPTER 7
)	
Debtor.)	JUDGE RUSS KENDIG
)	
)	MEMORANDUM OF DECISION

This matter came before the court upon debtor's "Amended Motion To Release Seized Funds," filed April 13, 2001, requesting an order directing the Medina Municipal Court to release debtor's funds held by the municipal court. For the reasons which follow, and upon the conditions stated, debtor's motion should be **GRANTED**.

FACTS

Debtor filed her voluntary petition for relief under Chapter 13 of Title 11 of the United States Code December 7, 2000. The facts are uncontroverted. Debtor alleges the municipal court attached debtor's Farmers State Bank account on December 6, 2000, in the amount of \$1,083.73 to satisfy a judgment obtained by Sears, Roebuck & Co. ("Sears") on November 10, 2000.

Debtor's schedules reflect an unsecured, nonpriority obligation to Sears in the amount of \$3,100.00. Debtor's schedules further reflect a balance of cash on hand in the amount of \$2.00 and a balance on deposit with Farmers State Bank in the amount of \$743.00, which debtor claimed as exempt under O.R.C. §2329.66(A)(4)(a). Debtor's "Statement of Financial Affairs" included Sears' judgment and the municipal court's execution, described as a judgment debtor execution. Sears filed its proof of claim February 15, 2001 in the amount of \$2,437.42.

Debtor alleges the funds held by the municipal court are necessary for debtor to satisfy her monthly obligations under her chapter 13 plan. Debtor alleges the funds are exempt under 11 U.S.C. §522(f)(1) and (h) and Ohio Revised Code §2329.66(A)(4)(a).

Debtor served her amended motion¹ April 11, 2001 upon counsel for Sears, the municipal court, the chapter 13 trustee and the United States Trustee. This court received no responses.

DISCUSSION

Debtor argues the municipal court should be required to release debtor's funds and asserts the municipal court will not release the funds absent an order from the United States Bankruptcy Court. In considering its authority to enter debtor's proposed order, the bankruptcy court also considers whether debtor can recover these funds as an alleged preference and whether debtor is required to commence an adversary proceeding to effect the release of these funds. Debtor alleges no violations of the automatic stay under 11 U.S.C. §362(a).

Debtor's Standing Under 11 U.S.C. §547

Debtor cited no authority supporting her standing to bring this action and Sears did not raise the issue. Generally 11 U.S.C. §547 grants avoidance powers only to the bankruptcy trustee. 11 U.S.C. §522(h) confers standing upon a debtor to invoke avoidance power under section 547(b) where debtor proves trustee could have avoided the transfer, trustee did not attempt the avoidance and debtor could have exempted the property transferred once avoided. Incorporating section 522(g)(1), section 522(h) also requires debtor's proof that the alleged transfer was involuntary and debtor did not conceal the property transferred.

The bankruptcy code defines a transfer broadly, including the involuntary disposal or parting with an interest in property. 11 U.S.C. §101(54). "Because a wage garnishment is an involuntary mode of parting with property, it constitutes a transfer under the Code." Morehead v. State Farm Mut. Auto. Ins. Co., 249 F.3d 445, 447 (6th Cir. 2001). There is no evidence debtor attempted to conceal the transferred property.

Debtor has satisfied the elements of section 522(h). The trustee failed to act. Debtor's claimed exemptions under state and federal law are appropriate and Sears failed to object. Debtor has also satisfied the requirements of section 522(g)(1). Accordingly, debtor has standing to bring this action.

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The motion as amended included a statement regarding the debtor's claimed exemptions in the funds, which statement was previously absent. Further, the amended motion was served with a proper notice of the motion, which notice was also previously absent. Finally, the amended motion did not include an integrated order, but rather was filed with an accompanying proposed order, as required by the court pursuant to Fed. R. Bankr. P. 9021.

Contested Matter vs. Adversary Proceeding

Fed. R. Bankr. P. 7001 enumerates ten categories of proceedings which are specifically denominated as adversary proceedings under the Bankruptcy Rules. Included among these is “a proceeding to recover money or property, other than a proceeding to compel the debtor to deliver property to the trustee . . . “ Fed. R. Bankr. P. 7001(1). Debtor failed to commence an adversary proceeding, but rather commenced this contested matter.

“Notwithstanding the requirements of Rule 7001, in cases where no prejudice to the parties has arisen or where no objection to the procedural defect has been lodged, certain courts allow matters to proceed by way of motion under Rule 9014 rather than as adversary proceedings, but this is prior practice.” 10 Colliers on Bankruptcy ¶7001.02, pp. 7001-3-7001-4 (15th ed. rev. 1998). See In re Command Services Corp., 102 B.R. 905 (Bankr. N.D.N.Y. 1989) (matter improperly raised as contested matter, rather than as adversary proceeding, will be allowed to proceed on merits as originally filed, where no objection to procedural defect has been lodged, and rights of affected parties have been adequately presented); In re Desilets, 247 B.R. 660, 664 (W.D. Mich. 2000) quoting Tully Constr. Co. v. Cannonsburg Environmental Assoc., Ltd. (In re Cannonsburg), 72 F.3d 1260, 1264-5 (6th Cir. 1996) (absent demonstrable prejudice, any error in conducting a contested matter rather than an adversary proceeding is harmless and therefore disregarded); In re Wilkinson, 196 B.R. 311 (Bankr. E.D. Va. 1996) (court could waive adversary requirement where creditor expressly waived requirement and where possibility existed that legal fees already equaled amount in controversy such that neither justice nor judicial economy would be served by bifurcating proceedings to require adversary); Fed. R. Bankr. P. 9005 (harmless errors shall be disregarded); Contra In re: Olivas, 129 B.R. 122 (Bankr. W.D. Tex. 1991) (chapter 13 debtors moved to compel judgment creditor to release prepetition garnishment lien on debtors’ accounts, court held adversary proceeding rather than contested matter was proper).

Further, Fed. R. Bankr. P. 4003 provides that proceedings by a debtor to avoid the transfer of exempt property under 11 U.S.C. §522(f) shall be by motion in accordance with Fed. R. Bankr. P. 9014. The court need not address the tension between Fed. R. Bankr. P. 4003 and Fed. R. Bankr. P. 7001 on the facts of this case.

Debtor presumably believed this action was properly postured as a contested matter under Fed. R. Bankr. P. 9014. Since Sears has neither objected nor raised the requirement of an adversary proceeding, there is no apparent prejudice to either party and the amount in controversy does not justify further delay or expense to the parties, the court waives the requirement of an adversary proceeding.

Elements Constituting Preferential Transfers

11 U.S.C. §547 allows the bankruptcy trustee to commence an action against certain creditors to recover certain prepetition transfers of debtor's property. The trustee bears the burden of proof, by a preponderance of the evidence, to establish that the *prima facie* elements of a preferential transfer are present. In re Libby International, Inc., 247 B.R. 463, 466 (6th Cir. B.A.P. 2000). If trustee establishes these elements, the burden then shifts to the transferee to establish any defenses. Id., at 466.

11 U.S.C. §547(b) reads:

- (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 none 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;
 - (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.

The funds attached by the municipal court to satisfy Sears' judgment, if a transfer, clearly represent a transfer for Sears', a creditor herein, benefit and are on account of debtor's prior obligation to Sears. Debtor is presumed insolvent under 11 U.S.C. §547(f) and the transfer occurred in the 90 days preceding debtor's filing. The transfer allowed Sears to receive more than it would have in a chapter 7 proceeding had the transfer not been made. For these reasons, debtor established that the seized funds represent a preferential transfer. Sears asserted no defenses.

11 U.S.C. §522(h) allows the debtor to recover to the extent the property is exempt. It is unclear that all of the funds are exempt and, accordingly, the court will order the funds to be paid to the trustee until that determination is made.

CONCLUSIONS

The power to avoid preferential transfers is generally reserved to trustees under the bankruptcy code. However, trustee failed to pursue this action and debtor meets the requirements to invoke avoidance powers under 11 U.S.C. §547(b). Actions to recover preferences are generally required to be commenced as adversary proceedings under the Bankruptcy Rules. The court waives this requirement and allows the matter to be resolved as a contested matter as filed. Debtor established that the alleged transfer represented a preferential transfer. Accordingly, the funds attached by the Medina Municipal Court should be released to the chapter 13 trustee for further administration with respect to debtor's claimed exemptions or, if the trustee elects, abandonment.

An appropriate order shall enter.

RUSS KENDIG
United States Bankruptcy Judge

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LINDA BARR,)	CHAPTER 7
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Debtor.)	JUDGE RUSS KENDIG
)	
)	ORDER

For the reasons set forth in the accompanying Memorandum of Decision, the court finds that debtor's motion is well taken and should be, and hereby is, **GRANTED**.

IT IS THEREFORE ORDERED that debtor's funds in the amount of \$1,083.73 attached by the Medina Municipal Court, including any interest thereon, shall be forwarded to the Office of the Chapter 13 Trustee, 121 Cleveland Ave., SW, Suite #110, Canton, Ohio 44702. Trustee shall make a determination as to the exempt amounts and either abandon the funds to the debtor or bring a motion before the court for determination, said motion to be filed within 14 days of receipt of the funds.

RUSS KENDIG
UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this _____ day of June, 2001, the above Order was sent via regular U.S. Mail to:

VANCEP. TRUMAN
323 South Court Street
Suite #210
Medina, Ohio 44256

BRUCE BLOCK
1300 East Ninth Street
Bond Court Building
Cleveland, Ohio 44114

MEDINA MUNICIPAL COURT
135 North Elm Street
Medina, Ohio 44256

OFFICE OF THE CHAPTER 13 TRUSTEE
William R. Day Building
121 Cleveland Avenue, SW
Suite #110
Canton, Ohio 44702

OFFICE OF THE UNITED STATES TRUSTEE
BP America Building
200 Public Square, 20th Floor
Suite #3300
Cleveland, Ohio 44114

Deputy Clerk