NOT FOR COMMERCIAL PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 05-90361
	)	
JAMES SUTTON,	)	Chapter 7
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
SHELDON STEIN, TRUSTEE,	)	Adversary Proceeding No. 07-1090
	)	
Plaintiff,	)	
	)	
v.	)	**MEMORANDUM OF OPINION**
	)	(NOT FOR COMMERCIAL PUBLICATION)
BERNICE MILTON,	)	
	)	
Defendant.	)	

The chapter 7 trustee filed this adversary proceeding seeking to avoid and recover a $4,000.00 transfer made by the debtor to defendant Bernice Milton. The trustee moves for summary judgment on the complaint and Ms. Milton opposes that request.[1] For the reasons stated below, the trustee's motion for summary judgment is granted.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered 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).[2]

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[1] Docket 21, 23, 24, 29.

[2] This written opinion is entered only to decide the issues presented in this case and is not intended for commercial publication in an official reporter, whether print or electronic.

THE SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c) (made applicable by FED. R. BANKR. P. 7056); *see also Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574 (1986). The movant must initially demonstrate the absence of a genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 323. A material fact is one whose resolution will affect the determination of the underlying action. *Tenn. Dep't of Mental Health & Mental Retardation v. Paul B.*, 88 F.3d 1466, 1472 (6th Cir. 1996). "The substantive law determines which facts are 'material' for summary judgment purposes." *Hanover Ins. Co. v. Am. Eng'g Co.*, 33 F.3d 727, 730 (6th Cir. 1994) (citations omitted). An issue is genuine if a rational trier of fact could find in favor of either party on the issue. *Schaffer v. A.O. Smith Harvestore Prods., Inc.*, 74 F.3d 722, 727 (6th Cir. 1996) (citation omitted).

If the moving party meets this burden, the burden shifts to the non-moving party to show the existence of a material fact which must be tried. *Id.* The non-moving party "may not rest upon the mere allegations . . . of [its] pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e) (made applicable by FED. R. BANKR. P. 7056). Those facts may be shown "by any of the kinds of evidentiary materials listed in Rule 56(c) . . . ." *Celotex Corp.*, 477 U.S. at 324.

All reasonable inferences drawn from the evidence must be viewed in the light most favorable to the party opposing the motion. *Hanover Ins. Co.*, 33 F.3d at 730. The issue at this stage is whether there is evidence on which a trier of fact could reasonably find for the nonmoving party. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1477 (6th Cir. 1989).

FACTS

The parties agree that there are no issues of material fact and these are the undisputed facts based on their pleadings and briefs:

The debtor James Sutton is retired and receives a monthly pension payment of approximately $2,200.00 from his Ford/UAW ERISA[3] qualified pension plan which is directly deposited into his National City Bank account. On September 24, 2005, the debtor withdrew $8,000.00 in cash from this account and used $4,000.00 of that money to pay his creditor, Ms. Milton.[4] It is undisputed that the debtor's pension payments were the source of the funds used to pay Ms. Milton. The debtor filed his chapter 7 case on October 11, 2005.

DISCUSSION

The trustee is seeking to avoid the transfer to Ms. Milton as a preferential transfer under bankruptcy code § 547 which provides:

> (b) Except as provided in subsections (c) and (i) 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

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[3] Employee Retirement Income Security Act of 1974, 29 U.S.C.A. § 1001 *et seq*.

[4] The other $4,000.00 was used to pay another creditor, Tim Henderson, and is the subject of a different adversary proceeding. *See* Adv. No. 07-1091.

> (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;
>
> (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 U.S.C.A. § 547(b).[5] The trustee has the burden of proving that the transfer is avoidable. 11 U.S.C. § 547(g).

The existence of the five elements of a preferential transfer are not disputed. The debtor is presumed to be insolvent during the 90 days preceding his bankruptcy. *See* 11 U.S.C. § 547(f). And it is clear that Ms. Milton is a creditor who received payment of her antecedent debt within 90 days of the debtor's bankruptcy filing and that the $4,000.00 payment enabled her to receive more than she would have received if the payment had not been made and she were to receive payment under chapter 7.

Section 547(b) limits preference avoidance to "transfer[s] of an interest of the debtor in property." 11 U.S.C. § 547(b). Ms. Milton's argument against recovery focuses on the source of the funds the debtor used to pay her and whether the money was "an interest of the debtor in property." The bankruptcy code does not define that term, however, "the Supreme Court has found that the term is 'best understood as that property that would have been part of the estate had it not been transferred [by the debtor] before the commencement of bankruptcy

[5] The trustee's complaint also requests relief under bankruptcy code § 544 and § 551.

proceedings'." *Meoli v. Kendall Electric, Inc. (In re R.W. Leet Electric, Inc.)*, – B.R. – , 2007 WL 2262848 at *4 (B.A.P. 6th Cir. 2007) (quoting *Begier v. IRS*, 496 U.S. 53, 58 (1990)). The court must, therefore, turn to § 541 to determine the "interest[s] of the debtor in property." *Begier*, 496 U.S. at 58-9.

Under § 541(c)(2), "[a] restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law" is enforceable in bankruptcy. 11 U.S.C. § 541(c)(2). ERISA states that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1). The plan anti-alienation provision required for ERISA qualification is an enforceable transfer restriction for purposes of § 541(c)(2)'s exclusion of property from the bankruptcy estate. *Patterson v. Shumate*, 504 U.S. 753, 760 (1992). Ms. Milton argues that the funds the debtor transferred to her were not an interest of the debtor in property because their source was the debtor's ERISA qualified pension plan.

Ms. Milton's argument against recovery turns on whether the debtor's pension funds retained their anti-alienation character after they were distributed to the debtor. Ms. Milton cites *United States v. Smith*, 47 F.3d 681 (4th Cir. 1995) to support her position. In that decision, the Fourth Circuit held that a restitution order requiring a defendant to pay his pension payment each month upon receipt violated ERISA's anti-alienability provisions.

The trustee, on the other hand, argues that ERISA did not continue to protect the debtor's pension payments once they were paid to and received by him, and he cites *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 39 F.3d 1078 (10th Cir. 1994) (en banc decision after remand by the U.S. Supreme Court, *Guidry,* 493 U.S. 365 (1990)), to support that argument. In *Guidry*, the Tenth Circuit held that the anti-alienation provisions of ERISA do not bar the

garnishment of pension benefits once they have been paid to and received by the beneficiary. *See also, Hoult v. Hoult*, 373 F.3d 47, 54-55 (1st Cir. 2004); *Wright v. Riveland*, 219 F.3d 905, 919-921 (9th Cir. 2000); *Trucking Employees of North Jersey Welfare Fund, Inc. v. Colville*, 16 F.3d 52, 54-56 (3d Cir. 1994).

Ms. Milton's argument is precluded by Sixth Circuit precedent which favors the *Guidry* decision. In *DaimlerChrysler Corp. v. Cox*, the Sixth Circuit considered whether Michigan's State Correctional Facility Reimbursement Act which required prison wardens to notify pension plans to send prisoner pension payments to their institutional accounts was preempted by ERISA. *DaimlerChrysler Corp. v. Cox*, 447 F.3d 967 (6th Cir. 2006), *cert. den*., 127 S. Ct. 2971 (2007). The Court held that the act as applied was preempted by ERISA because it encumbered pension benefit payments before they left the plan's control, but noted, however, that "Circuit precedent . . . stands for the proposition that once a pension plan has sent benefit payments to a beneficiary and relinquished control of those payments, the attachment of those funds by a creditor does not constitute an alienation." *Id. at* 974. *See also, First Trust Corp. v. Bryant*, 410 F.3d 842, 850 n. 3 (6th Cir. 2005) (referencing *Guidry* and noting that the Sixth Circuit has adopted the Tenth Circuit's view that the ERISA anti-alienation provision no longer applies once benefits have been released to the proper beneficiary).

Based on this discussion, the ERISA anti-alienation provision did not apply to the debtor's pension plan payments once they were deposited into his National City Bank account and the funds were not subject to a restriction which would exclude them as property of the estate under § 541(c)(2). The debtor had an interest in the funds and the transfer to Ms. Milton is subject to avoidance under § 547(b). *See Silagy v. Bank One, Akron, N.A. (In re Collin)*, 182 B.R. 763 (Bankr. N.D. Ohio 1995); *Yoppolo v. Fifth Third Bank of NW Ohio (In re Bostic)*, 171

B.R. 270, 273 (Bankr. N.D. Ohio 1994). The undisputed facts, therefore, show that the $4,000.00 transfer to Ms. Milton was a preferential transfer that is subject to avoidance under bankruptcy code § 547(b).

CONCLUSION

For the reasons stated, the trustee's motion for summary judgment is granted. The court will enter a separate order memorializing this decision.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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SHELDON STEIN, TRUSTEE,	)	Adversary Proceeding No. 07-1090
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Plaintiff,	)	
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v.	)	**JUDGMENT**
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Defendant.	)	

For the reasons stated in the memorandum of opinion filed this same date, plaintiff-trustee's motion for summary judgment is granted. (Docket 21). As a result, the plaintiff is granted judgment under 11 U.S.C. § 547(b). The $4,000.00 transfer to Bernice Milton is avoided and the trustee is entitled to recover that amount from Ms. Milton.

IT IS SO ORDERED.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge