UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Northern Division

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| In re: | ) | Bankr. No. 01-10052 |
| | ) | |
| NED MARYOTT | ) | Chapter 7 |
| fdba Maryott Livestock | ) | |
| Soc. Sec. No. 508-32-7483 | ) | INTERIM DECISION RE: |
| | ) | TRUSTEE'S MOTION TO SATISFY |
| Debtor. | ) | JUDGMENT AND RELATED ISSUES |

The matter before the Court is Trustee William J. Pfeiffer's Motion to Approve Execution of Satisfaction of Judgment and Payment of Attorney Fees and the several responses thereto. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Interim Decision shall constitute the Court's initial findings and conclusions under Fed.Rs.Bankr.P. 7052 and 9014. As set forth below, the Court concludes that, subject to any § 545(2) avoidance action by the Trustee, the law firm of Johnson, Heidepriem, Miner, Marlow & Janklow, L.L.P., has a valid pre-petition, statutory lien on a judgment that Debtor holds against the First National Bank of Eden; that the Bank is not entitled to recoup its pre-petition claim from Debtor's judgment; and that a pre-petition setoff of debts between Debtor and the Bank did not occur. A final order regarding the Trustee's Motion to Approve Execution of Satisfaction of Judgment and Payment of Attorney Fees will be entered after the resolution of the Bank's pending motion for relief from stay.

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I.

Ned Maryott ("Debtor") filed a Chapter 7 petition in bankruptcy on March 8, 2001. In his schedules, Debtor stated he owned 200 acres of land in Marshall County, South Dakota. He valued it at $60,000 and stated it had a secured claim of $168,534.33 against it. Debtor stated that he had another 160 acres that was his homestead. Debtor valued this land at $112,000 and stated it had no claims against it. Debtor scheduled limited household goods and personal items. He included among his assets a claim against the First National Bank of Eden ("Bank")[1] for $785,000.

Debtor, as a person age 70 or over, declared exempt as his homestead the entire 160 acres. He also claimed exempt all items of personal property that he had scheduled, including, up to a value of $3,840, his claims against the Bank and two individuals,

Debtor scheduled two secured creditors: the Bank for $168,534.33 on a note/real estate mortgage and Scott Heidepreim on an attorney's lien for $404,111. Debtor listed six general unsecured claim holders whose claims totaled $616,603.06.

On April 18, 2001, the case trustee, William J. Pfeiffer, filed a Motion to Approve Execution of Satisfaction of Judgment and

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[1] First National Bank of Eden is now known as Great Plains Bank.

Payment of Attorney Fees. Therein, he stated that the Bank had offset Debtor's judgment against it with the mortgage debt due the Bank from Debtor. Trustee Pfeiffer further stated that the Bank had forwarded the balance of the judgment, $420,417.93, and had demanded that he satisfy the judgment as provided by state law. Trustee Pfeiffer also told the Court that an unsecured creditor, Central Livestock Association, Inc. ("Central Livestock"), had advised him by letter not to satisfy the Bank's judgment, but instead urged him to make the Bank look to its mortgage on Debtor's homestead to satisfy its claim and thereby leave the judgment proceeds to pay Central Livestock and other claimants. In sum, Trustee Pfeiffer wanted the Court to approve his acceptance of the Bank's check, a satisfaction of the Bank's judgment, and the payment of fees to the attorneys who held a lien on the judgment proceeds.

The Trustee's motion generated responses from Farmers Alliance Mutual Insurance Company ("Farmers Alliance"); Copple & Rockey, P.C.; Central Livestock; Jack Schaffer; and Debtor. Only Debtor supported the Trustee's proposed action. The attorneys claiming a lien on the judgment proceeds, Johnson, Heidepriem, Miner, Marlow & Janklow, L.L.P. ("Law Firm"), responded to Farmers Alliance's objection. Central Livestock also joined a portion of Farmers Alliance's objection. Tri-County Cattle, Inc., ("Tri-County Cattle") joined Central Livestock's objection in that portion

objecting to the satisfaction of the Bank's mortgage, but it did not quarrel with the Trustee's desire to pay the Law Firm.

A hearing on the Trustee's Motion was held May 1, 2001. A discussion on the record led to the conclusion that there were two matters to resolve: what the lien priorities were on the judgment proceeds and whether, through the marshaling of assets, the Bank could be required to look to its mortgage on Debtor's homestead, rather than to Debtor's judgment against the Bank, to satisfy its claim. The parties in interest on each matter were directed to file stipulated facts and issues, and a briefing schedule was set.

## II.
## VALIDITY AND PRIORITY OF CERTAIN LIENS.

*Summary of facts, statement of issues, and summary of arguments.* The parties in interest[2] stipulated that the issues presented were: (1) whether the Law Firm or Farmers Alliance had the superior lien on Debtor's judgment against the Bank,[3] and (2) whether either lien is avoidable under 11 U.S.C. § 547. The parties in interest stipulated to the following additional facts:

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[2] At the May 1, 2001, hearing on Trustee Pfeiffer's Motion to Approve Execution of Satisfaction of Judgment and Payment of Attorney Fees, Trustee Pfeiffer, Farmers Alliance, Central Livestock, and the Law Firm elected to participate in the resolution of the lien validity and priority issues. Trustee Pfeiffer participated only in the preparation of the stipulated facts and issues; he did not file a brief.

[3] No one questioned whether the Law Firm's lien is superior to the Bank's setoff claim. *See Lee v. Sioux Falls Motor Co., 274 N.W. 614, 615* (S.D. 1937).

1. The Law Firm was formally retained by Debtor on October 23, 1997, to represent him in litigation against the Bank regarding the wrongful dishonor of three checks.

2. A state court jury returned a verdict in favor of Debtor for $600,000 on March 31, 2000. Debtor obtained a judgment for $713,750 on April 5, 2000, which included pre-judgment interest. Later, Debtor also was awarded costs of $5,136.15.

3. The Bank appealed the decision. On April 4, 2001, the judgment was affirmed in part and reversed in part by the South Dakota Supreme Court. The Supreme Court reduced Debtor's judgment to $563,700. With post-judgment interest and costs, Debtor's final award was $625,261.15.

4. On the date of the South Dakota Supreme Court's opinion, the Law Firm was owed $281,367.52 in compensation for services, $16,882.05 for sales tax, and $24,144.88 for expenses for a total of $322,394.45. This sum is not in dispute. All the Law Firm's services were rendered before Debtor filed bankruptcy, except for reviewing the Supreme Court's opinion, advising Debtor of the opinion, and arranging payment of the final judgment. The Law Firm has not received any fees regarding its representation of Debtor.

5. Central Livestock obtained a judgment against Debtor for $247,000 plus interest on January 2, 1997. On Debtor's petition date, this judgment stood at $297,913.57. This sum is not in dispute.

6. Farmers Alliance obtained a judgment against Debtor for $72,622.43 plus interest on January 3, 1997. On the petition date, this judgment stood at $102,944.96. This sum is not in dispute.

7. Farmers Alliance obtained a Writ of Execution on its judgment on January 11, 2001. The local sheriff issued a Notice of Levy on January 16, 2001. The Law Firm and the local clerk of court were served with the Notice on January 16, 2001. Debtor was personally served with the Notice on February 20, 2001. The Bank was not served with the Notice, but it had actual knowledge of the levy on January 25, 2001. The sheriff issued a Notice of Sale on February 14, 2001, and gave notice by publication on February 21 and 28, 2001. The sale was scheduled for March 13, 2001.

8. The Law Firm served written notice of its attorneys' lien on February 1, 2001, on the Bank and other interested parties. The lien was docketed with the local clerk of court on February 5, 2001.

9. Debtor filed his Chapter 7 petition on March 8, 2001. The bankruptcy stayed the execution sale generated by Farmers Alliance that had been scheduled for March 13, 2001.

10. On April 12, 2001, the Bank wrote a check drawn on its own account for $420,417.93 payable to Trustee Pfeiffer and the Law Firm to satisfy the judgment Debtor held against the Bank. The difference between the check and the judgment, $204,843.22, reflected the Bank's secured claim against Debtor that it wanted to setoff against the judgment.

11. According to Debtor's schedules, the bankruptcy estate assets are insufficient to pay all scheduled, general unsecured creditors in full.

The parties filed with their stipulation of facts several related documents.

Through the course of their briefs and reply briefs, the parties significantly narrowed the issues presented. Farmers Alliance conceded that its lien is avoidable under § 547(b) as a preferential transfer. Farmers Alliance and Central Livestock also conceded that any lien the Law Firm may have is a statutory lien that may not be avoided under § 547(c). Farmers Alliance and Central Livestock then argued one other issue: whether the Law Firm had met the statutory requirements for creation of a statutory lien for its attorneys' fees.

*Discussion.* South Dakota's statute for the creation of a lien for attorneys' fees provides:

> An attorney and counselor at law has a lien for a general balance of compensation in and for each case upon:
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> ....
>
> (3) Money due his client in the hands of the adverse party or attorney of such party, in an action or proceeding in which the attorney

> claiming the lien was employed, from the time of giving notice in writing to such adverse party or attorney of such party, if the money is in the possession or under the control if such attorney, which notice shall state the amount claimed and in general terms what services; after judgment in any court of record such notice may be given and the lien made effective against the judgment debtor by entering it in the judgment docket.

S.D.C.L. § 16-18-21(3). Central Livestock challenged the validity of the Law Firm's lien on the grounds that the Law Firm failed to give written notice to the Bank, who had possession of the judgment funds, in addition to or in lieu of notice to the Bank's attorney as directed by S.D.C.L. § 16-18-21(3) and because the Law Firm had not alternatively docketed the judgment as provided by § 16-18-21(3). With its reply brief, the Law Firm provided documentation that it had indeed filed a notice of lien with the Clerk of Court on February 5, 2001, and that the lien was noted in the judgment docket. Consequently, that objection to the Law Firm's attorney's lien is resolved.

Farmers Alliance quarreled that the Law Firm's notice did not sufficiently state the total amount claimed, as required by the statute. The Law Firm's notice filed on February 5, 2001, stated:

> PLEASE TAKE NOTICE that Johnson, Heidepriem, Miner, Marlow & Janklow, L.L.P., claims an Attorney's Lien for attorneys' fees, sales tax, and costs paid, including current expenses in the amount of $23,342.50, and recoverable pursuant to any judgment received and in accordance with the Attorney's Retainer Agreement (45%) dated October 23, 1997, a copy

> of which is attached hereto and incorporated herein by reference as Exhibit A. Further, summaries of all attorneys' fees, sales tax, costs and expenses incurred in connection with the identified Attorney's Retainer Agreement are attached hereto and incorporated herein by reference as Exhibit B.

The notice was captioned in Debtor's state court action against the Bank and others and it was entered after the April 5, 2000, judgment by the trial court.

The Court concludes that this notice and attached exhibits sufficiently stated the amount claimed, as required by § 16-18-21(3). There is substantial compliance with the statute when the nature of the relationship of the parties is considered. *See Ringgenberg v. Wilmsmeyer*, 253 N.W.2d 197, 200-201 (S.D. 1977). The statement adequately notified an ordinarily intelligent and careful person what the subject of the lien is. *Id.* at 200, 202.

Neither Farmers Alliance nor Central Livestock discussed whether the Law Firm's statutory lien is avoidable by Trustee Pfeiffer under 11 U.S.C. § 545, which is an element of the preference exception under § 547(c)(6). The Law Firm only cursorily addressed § 545 in its brief filed July 16, 2001. Consequently, the Court will not further address the § 545 element herein.[4]

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[4] If Trustee Pfeiffer brings an avoidance action against the Law Firm under § 545(2), where he steps into the shoes of *bona fide* purchaser, it appears the Court may have to address the potential interplay between S.D.C.L. §§ 16-18-21 and 44-2-3 regarding third-

## III.
## DEBTOR'S CLAIMED HOMESTEAD AND MARSHALING.

*Summary of facts, statement of issues, and summary of arguments.* The parties in interest[5] stipulated that the multifaceted issue presented was whether the Bank may be required to foreclose its real estate mortgage on Debtor's homestead under the equitable doctrine of marshaling where Debtor, but not his non-debtor spouse, waived the homestead exemption as to the mortgage; where Debtor, but not his non-debtor spouse, is the debtor under the mortgage and several judgments; and where there is cash available to pay the Bank in full without resorting to a mortgage foreclosure. These parties stipulated to the following additional facts:

1. Debtor owns three parcels of real estate. The first is described as:

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party notice. Several courts have considered third-party notice issues where the attorney lien statutes are similar to South Dakota's. Differing conclusions have been reached. *See Armstrong v. Eaton Law Firm (In re Reinhardt)*, 81 B.R. 565 (Bankr. N.D. 1987)(no third party notice required)(cases -- supporting and contra -- cited therein). *See also Pierce v. Aetna Life Insurance Co. (In re Pierce)*, 809 F.2d 1356 (8th Cir. 1987)(notice of attorney lien to third parties required under Minnesota law).

[5] At the May 1, 2001, hearing on Trustee Pfeiffer's Motion to Approve Execution of Satisfaction of Judgment and Payment of Attorney Fees, Trustee Pfeiffer, Debtor, Central Livestock, Tri-County Cattle, and the Bank elected to participate in the resolution of the issues regarding Debtor's claimed homestead exemption and the marshaling of assets by the Bank. Trustee Pfeiffer and Tri-County Cattle, however, participated only in the preparation of the stipulated facts and issues; they did not file briefs.

> Lots 6 and 8, Section 6, Township 126 North, Range 53, West of the 5th P.M., Marshall County, South Dakota.

The second is:

> The North ½ of the Southeast Quarter of Section 6, Township 126 North, Range 53, West of the 5th P.M., Marshall County, South Dakota.

The third, which Debtor has declared exempt as his homestead, is:

> The Northwest Quarter of Section 9, Township 126 North, Range 58, West of the 5th P.M., Marshall County, South Dakota.

2. The value of the claimed homestead does not exceed $112,000. The assessed value of the claimed homestead is $93,224.

3. On December 29, 1993, Debtor and his first wife signed a promissory note in favor of the Bank. The note was secured by mortgages on the three parcels, including the homestead. Debtor waived his homestead privilege to the extent of the mortgages.

4. Debtor's first wife died in January 1996.

5. On March 13, 1996, the Bank loaned more money to Debtor, and it obtained an additional mortgage on the three parcels, including the homestead acres.

6. On October 1, 1996, the Bank setoff Debtor's checking account in the sum of $254,103.55. This was the amount Debtor owed Great Plains on the notes and mortgages, excluding $1.00. The Bank retained that $1.00 debt to maintain a mortgage. The Bank was able to setoff Debtor's checking account because on September 30, 1996, it dishonored three large checks that had previously been paid. The dishonorment of the checks violated the midnight deadline rule and resulted in the lawsuit by Debtor against the Bank.

7. One dishonored check was payable to Tri-County Livestock for $30,544.33. In February 1998, the Bank again honored the check and reversed the credit to Debtor's account.

8. Another dishonored check was payable to Schaffer Cattle Company for $132,990. In August 1999, the Bank again honored the check and reversed the credit to Debtor's account.

9. The third dishonored check was payable to Tri-County Livestock. In February 2000, the Bank settled this dishonorment for $5,000 and the reversed the credit to Debtor's account.

10. After these three reversals to Debtors account, Debtor still owed the Bank $168,534.33. On May 9, 2000, the state trial court concluded that the amount the Bank had paid to settle the dishonored checks represented monies owed to the Bank by Debtor and that the Bank could offset that debt against the Debtor's judgment. The trial court entered its order on this issue on May 12, 2000. The South Dakota Supreme Court later affirmed the trial court's ruling.

11. Before any setoff, the Bank's claim against Debtor exceeded the value of his homestead acres.

12. Debtor has several judgment creditors. Central Livestock obtained the first recorded judgment on January 2, 1997, for $247,000. No judgment creditor filed an execution on the homestead acres.

13. Debtor remarried in May 1996. Debtor and his present wife live on the homestead property and have done so since their marriage. Debtor's present wife is not personally liable to any of the judgment creditors or the Bank.

14. On March 8, 2001, when Debtor filed his petition in bankruptcy, he was at least 70 years old. His present wife was younger than 70 on that date.

Central Livestock initially argued that the Bank should be required to foreclose its mortgage on Debtor's homestead property before it seeks an offset against the judgment it owes Debtor. In its reply brief, however, Central Livestock conceded that South Dakota case law restricts such marshaling of assets when homestead property needs protection. No other party has fostered this argument. Accordingly, the marshaling issues have fallen by the wayside in this case.

Relying on *In re Hughes*, 244 B.R. 805 (Bankr. D.S.D. 1999),

and *Beck v. Lapsley*, 593 N.W.2d 410 (S.D. 1999), Central Livestock's remaining argument was that Debtor's petition in bankruptcy should be deemed a voluntary sale that automatically decreases Debtor's homestead exemption from an unlimited amount since he is a person over age 70 to a maximum homestead exemption allowance of $30,000 in equity. Debtor refuted this argument and correctly identified Central Livestock's failure to accurately characterize this Court's statement in *Hughes*.

DISCUSSION. South Dakota's homestead exemption statute provides that a homestead, as defined by ch. 43-31, is absolutely exempt or, if it is sold under ch. 21-19 or sold voluntarily, then it is limited to $30,000. S.D.C.L. § 43-45-3. This $30,000 will be absolutely exempt for one year after the owner receives the proceeds. There is an exception, however. "Such exemption shall not be limited to thirty thousand dollars for a homestead of a person seventy years of age or older or the unremarried surviving spouse of such person *so long as it continues to possess the character of a homestead.*" S.D.C.L. § 43-45-3(2)(emphasis added).[6]

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[6] Except for the last sentence of subsection (2), § 43-45-3 has been a part of South Dakota's homestead laws since at least 1939 with only the value limitation changing over the years. *See* S.D.C. § 51.1802(7)(1939). The last sentence in subsection (2) was added in 1980. S.L. 1980, ch. 296, § 3. The phrase "so long as it continues to possess the character of a homestead," which is a part of the last sentence in subsection (2), has been a part of § 43-31-1 and that statute's earlier versions since at least 1874-75. *See* S.L. 1874-75, ch. 37, § 1 (Dak. Terr.).

In *Beck*, the South Dakota Supreme Court, with limited discussion, concluded that upon a voluntary sale of a homestead, the property no longer possesses the character of a homestead, as required by § 43-45-3(2). *Beck*, 593 N.W.2d at 413. The state Supreme Court thus has interpreted § 43-45-3(2) to provide that a debtor, age 70 or over, may protect a homestead of any value from an execution sale, but that he may protect only $30,000 in proceeds for one year if he *voluntarily* sells his home. *Id.* at 412-13.

The conclusion in *Beck* appears to be inconsistent with S.D.C.L. § 43-31-9, which states an owner may change his homestead entirely, and S.D.C.L. § 43-31-11, which provides that "[t]he new homestead shall in all cases be exempt to the same extent and in the same manner as the old or former homestead was exempt."[7] The conclusion in *Beck* also appears to be inconsistent with earlier case law. *See Christiansen v. United National Bank of Vermillion*, 176 N.W.2d 65, 67 (S.D. 1970)(upon a voluntary sale, every protection originally given to the homestead right adheres to the proceeds for one year after receipt); *Smith v. Midland National Life Insurance Co.*, 234 N.W. 20, 21 (S.D. 1930)("An attempt to sell the property is not in and of itself any evidence of an abandonment."; *Smith v. Hart*, 207 N.W. 657, 658-59 (S.D. 1926)(in

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[7] The provisions of S.D.C.L. §§ 43-31-9 and 43-31-11 have been a part of South Dakota's homestead laws since 1875. *See* S.L. 1874-75, ch. 37, §§ 12 and 13 (Dak. Terr.).

order to give full effect to the state's statute that allows an owner to change his homestead, the proceeds from a voluntary sale of a homestead, which the owner intends to reinvest in a new homestead, must be protected from creditors)[8]; *see also Keleher v. Technicolor Government Services, Inc.*, 829 F.2d 691, 693 (8th Cir. 1987)(a debtor cannot be presumed to willingly imperil his homestead or homestead proceeds unless necessity so requires or he expressly does so)(cites therein); *Botsford Lumber Co. v. Clouse (In re Clouse's Estate)*, 257 N.W. 106, 108 (S.D. 1934)(the homestead privilege ceases when there is no longer any reason for the homestead).

In *Hughes*, this Court applied S.D.C.L. § 43-45-3(2) in a case where the debtor was *under* age 70. The Court concluded that equity in a homestead in excess of $30,000 was property of the bankruptcy estate available to pay creditor's claims. *Hughes*, 244 B.R. at 810-12. The Court noted in *Hughes* that the same conclusion would be reached regardless of whether the debtor's bankruptcy petition was deemed a voluntary sale of the property, *see Karcher v. Gans*, 83 N.W. 431, 432 (S.D. 1900)(cited in *Hughes*, 244 B.R. at 813 and 813 n.6), or whether the case trustee accessed the equity by

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[8] As discussed in *Christiansen*, 176 N.W.2d at 67, *Smith v. Hart* prompted a change in South Dakota's homestead exemption statutes to clarify that a voluntary sale did not constitute an abandonment of the homestead.

standing in the shoes of a judgment lien creditor. *Hughes,* 244 B.R. at 812-13.

In light of the South Dakota Supreme Court's recent ruling in *Beck*, it appears that a different result would be reached in this case, where Debtor is age 70 or older, depending on which theory was applied. If we considered Debtor's bankruptcy petition as putting the trustee in the shoes of a judgment lien creditor, Debtor's entire homestead would be protected, regardless of value, because the Trustee could not force an execution sale. However, if we considered Debtor's bankruptcy as a voluntary transfer of his property, including his homestead, then under *Beck* Debtor could only protect $30,000 in equity. The Court will not force that loss of exemption upon Debtor by deeming his Chapter 7 petition to be a voluntary transfer of his and his wife's homestead property. First, to do so would be inconsistent with S.D.C.L. §§ 43-31-9 and 11, which allow a debtor to change his homestead without peril to his exemption. Second, exemption laws are to be construed liberally in the debtor's favor. *Wallerstedt v. Sosne (In re Wallerstedt)*, 930 F.2d 630, 631 (8th Cir. 1991)(cited in *Andersen v. Ries (In re Andersen)*, 259 B.R. 687, 690 (B.A.P. 8th Cir. 2001)). Third, the application of exemption laws should not be altered by the filing of a bankruptcy petition. *See Hughes*, 244 B.R. at 812. Finally, this result is consistent with the Court's

decision on a related judgment discharge issue in *Langford State Bank v. West (In re West)*, Bankr. No. 99-10322, Adv. No. 00-1013, slip op. at 3-4 (Bankr. D.S.D. Dec. 26, 2000). Accordingly, Debtor may declare the entire 160 acres exempt as his homestead, regardless of value. Trustee Pfeiffer, as a hypothetical judgment lien creditor, or other actual judgment lien creditors may not access any equity in this homestead that may exceed $30,000.

## IV.
## SETOFF OF FUNDS BY THE BANK.

Using the stipulated facts set forth in section III. above, Debtor, Central Livestock, and the Bank also briefed the issue of whether the Bank had effected a pre-petition setoff. Debtor and the Bank both argued that the Bank has effected a "recoupment," rather than a setoff. Citing some cases and a legal dictionary, Debtor and the Bank defined an equitable recoupment as a legal process that permits one party to a transaction to withhold funds due the other party so long as the debt arises from the same transaction. The Bank urged the Court to find that it was entitled to a recoupment, which is not subject to the automatic stay. Debtor urged the Court to find that a recoupment occurred October 1, 1996, when the Bank applied its mortgage debt against Debtor's checking account.

In the alternative, if a recoupment is not found, Debtor urged the Court to find that the Bank effected a setoff on October 1,

1996, when Debtor's checking account was cleaned out. Both the Bank and Debtor urged the Court to find, alternatively, that a setoff occurred May 9, 2000, when the state trial court ruled that the Bank could setoff its mortgage debt against the judgment debt that the Bank owed Debtor for the wrongful dishonorment of the checks. For the requirements of a setoff, the Bank cited *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16 (1995).

Opposing the Bank's and Debtor's assertions that the Bank may recoup its note/mortgage claim from the judgment it owes Debtor, Central Livestock, citing *University of Medical Center v. Sullivan (In re University Medical Center)*, 973 F.2d 1065 (3rd Cir. 1992), argued that the Bank's judgment obligation to Debtor is independent from the Bank's note/mortgage claim against Debtor, and thus does not arise from the same transaction. Further, Central Livestock argued that no valid, pre-petition setoff occurred because no money changed hands until the Bank presented Trustee Pfeiffer with a check.

*Discussion.* The Court concludes that the requirements for a recoupment were not presented under these facts. The Bank's pre-petition dishonorment of three checks written by Debtor, though motivated by the mortgage debt Debtor owed the Bank, was a separate transaction from the notes and mortgages Debtor gave the Bank. *See United States v. Dewey Freight System, Inc.*, 31 F.3d 620, 622-25

(8th Cir. 1994). One transaction could and did occur independent of the other.

Further, some courts have found that two elements are necessary for an equitable recoupment to be recognized in a bankruptcy case: both claims must arise from a single transaction *and* some type of overpayment must exist. *See Pruett v. American Income Life Insurance Co. (In re Pruett)*, 220 B.R. 625, 627-28 (Bankr. E.D. Ark. 1997)(cites therein); *Photo Mechanical Services, Inc. v. E.I. DuPont De Nemours & Co. (In re Photo Mechanical Services, Inc.)*, 179 B.R. 604, 612-14, 614 n.6 (Bankr. D. Minn. 1995)(cites therein). Clearly, the element of an overpayment is also not present here.

The Court further concludes that although a pre-petition setoff was authorized by the state court on May 9, 2000, a setoff was not effectuated before Debtor filed his petition in bankruptcy. The three requirements for a setoff to have occurred were: (1) a decision to effectuate a setoff; (2) some action taken to accomplish that setoff; and (3) a recording of the setoff. *Strumpf*, 516 U.S. at 19. Here, the second element is missing. No action was taken pre-petition to accomplish the setoff after it was authorized by the state court.

Since no pre-petition setoff occurred, the Bank must seek relief from the automatic stay to do so post-petition. 11 U.S.C. §§ 362(a)(7) and 553. The Bank filed that motion on May 9, 2001.

An objection was filed by Central Livestock. Farmers Alliance joined the objection. At the June 12, 2001, telephonic hearing on the Bank's motion, the parties agreed to put the motion on hold pending resolution of these other matters. Upon entry of this Interim Decision, counsel for the Bank, Central Livestock, and Farmers Alliance shall confer and advise the Court what further proceedings, if any, are necessary to resolve the Bank's motion and objections. A final order regarding the Trustee's Motion to Approve Execution of Satisfaction of Judgment and Payment of Attorney Fees will then be entered after the resolution of the Bank's relief from stay motion.

Dated this 24 day of September, 2001.

BY THE COURT:

Irvin N. Hoyt
Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk
By Deputy Clerk
(SEAL)

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered
SEP 24 2001
Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to the parties on the attached service list.

SEP 24 2001

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court, District of South Dakota
By

Case: 01-10052 Form id: 122 Ntc Date: 09/24/2001 Off: 3 Page : 1
Total notices mailed: 11

| | |
|---|---|
| Debtor | Maryott, Ned 11334 420th Avenue, Britton, SD 57430-5635 |
| Aty | Gerry, Clair R. PO Box 966, Sioux Falls, SD 57101-0966 |
| Trustee | Pfeiffer, William J. PO Box 1585, Aberdeen, SD 57402-1585 |
| Creditor | Copple & Rockey, P.C., 2425 Taylor Avenue, PO Box 78, Norfolk, NE 68702-0078 |
| Aty | Cremer, James M. PO Box 970, Aberdeen, SD 57402-0970 |
| Aty | Engel, Timothy M. PO Box 160, Pierre, SD 57501 |
| Aty | Gering, Bruce J. Office of the U.S. Trustee, 230 S Phillips Ave, Suite 502, Sioux Falls, SD 57104-6321 |
| Aty | Perrenoud, Scott M. PO Box 1157, Sioux Falls, SD 57102 |
| Aty | Rasmussen, Reed A. PO Box 490, Aberdeen, SD 57402-0490 |
| Aty | Ronayne, Robert M. PO Box 759, Aberdeen, SD 57402-0759 |
| Creditor | Schaffer, Jack 2881 77th Street S.E., Napoleon, ND 58561 |