UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Northern Division

In re:	)	Bankr. No. 97-10300
	)	Chapter 7
LYNN KEITH SWANSON	)	
d/b/a Midwest Transfer	)	MEMORANDUM OF DECISION RE:
Soc. Sec. No. 504-70-7554	)	MIDWEST CREDIT'S MOTION
	)	FOR RELIEF FROM STAY
Debtor.	)	

The matter before the Court is the Motion for Relief From Automatic Stay filed by Midwest Credits, Inc., and Debtor's response thereto. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Memorandum of Decision and accompanying Order shall constitute the Court's findings and conclusions. As set forth below, the Court concludes that the funds held by Debtor's employer pursuant to a garnishment action commenced by Midwest Credits are property of the bankruptcy estate over which Midwest Credits does not have a perfected lien. Accordingly, Midwest does not have an interest that it needs protected outside of bankruptcy following relief from the stay.

I.

Midwest Credits, Inc., (Midwest) obtained a judgment against Lynn K. Swanson sometime before July 7, 1997. On July 7, 1997, Midwest served Swanson's employer, Mid-America Centers (Mid-America), with a GARNISHEE SUMMONS [and] CONTINUING LIEN. Midwest served Swanson with the same GARNISHEE SUMMONS on July 28, 1997.

Mid-America returned a disclosure to Midwest on July 28, 1997. The specific contents of the disclosure are unknown but it is presumed that Mid-America advised Midwest that it had wages owed Swanson available for garnishment. Neither Mid-America nor Swanson

23

answered the summons. Midwest did nothing more to complete the garnishment. Mid-America did not prepare another disclosure as contemplated by S.D.C.L. § 21-18-14.1. Under S.D.C.L. § 21-18-14.1, the continuing lien expired sixty days after the garnishee summons was effective or about September 5, 1997.

Swanson (Debtor) filed a Chapter 7 petition on October 30, 1997. At that time, Mid-America was holding approximately $538.95 in garnished wages. However, the requirements of S.D.C.L. § 21-18-33 had not yet been fulfilled. That is, Mid-America was still retaining the garnished funds but Midwest had not served Mid-America with a levy, Swanson had not authorized Mid-America to pay Midwest, and Mid-America had not received a court order telling it to pay the garnished funds to Midwest.

On January 21, 1998, Midwest filed a MOTION FOR RELIEF FROM AUTOMATIC STAY. It claimed that under S.D.C.L. § 21-18-12, Mid-America is personally liable to Midwest for the garnished funds. Midwest relied on *Wasserburger v. Consolidated Management Corp. (Wasserburger II)*, 502 N.W.2d 256, 258-59 (S.D. 1993), where the state supreme court said a garnishment action was not stayed by the debtor's bankruptcy filing. Midwest further claimed that the funds are not property of the bankruptcy estate and that its garnishment action was no longer with Debtor but with Mid-America. For that proposition, it again relied on *Wasserburger II*. In the alternative, Midwest first argued that even if the funds are property of the bankruptcy estate, it has a statutory lien that cannot be avoided. Midwest's second alternative argument is that

if a preferential transfer occurred, the $538.95 is an exception to the preference provision pursuant to 11 U.S.C. § 547(c)(8) because this is primarily a consumer case and the amount of the transfer is less than $600.00.

Debtor responded on February 11, 1998. He argued that the funds are still property of the bankruptcy estate because Mid-America had not been served with a levy or order authorizing release of the funds. He relied on a recent bankruptcy case from Missouri, *Thomas v. Beneficial of Missouri (In re Thomas)*, 215 B.R. 873 (Bankr. E.D. Mo. 1997). Debtor also argued that he does not have to avoid any transfer because he can exempt those wages from execution. He relied on S.D.C.L. § 21-18-12. Finally, Debtor argued that any lien can be avoided and he can claim the funds exempt under S.D.C.L. § 43-45-4.

Midwest responded on February 13, 1998. It pointed out that under 1990 amendments to the South Dakota Codified Laws there are no exemptions that apply to garnished wages except those set forth in §§ 21-18-51 and 21-18-52.

A hearing was held March 5, 1998. Appearances included Kent Hyde for Midwest, Randall B. Turner for Debtor, and Trustee William J. Pfeiffer. Arguments were received. Post-hearing, Midwest filed a supplemental brief. It argued that through S.D.C.L. § 21-18-14.1, Midwest obtained a continuing lien over the garnished funds that was protected from avoidance by 11 U.S.C. § 546(b). Midwest claims the lien was perfected on the petition date and that only the release of the funds from Mid-America to Midwest was stayed by the bankruptcy.

II.

GARNISHMENT UNDER SOUTH DAKOTA LAW. To enforce a judgment, a creditor in South Dakota may garnish the judgment debtor's earnings by serving a summons, affidavit, and a garnishment disclosure form on the entity or person holding the earnings. S.D.C.L. §§ 21-18-2.1, 3, and 7. These documents must also be served on the judgment debtor. S.D.C.L. § 21-18-10.

Once the earnings holder receives the summons, the earnings holder

> stand(s) liable to the [judgment creditor] to the amount of the [money] in his possession or under his control belonging to the [debtor or in which the debtor may have an interest] to the extent of [debtor's] right or interest therein, and of all debts due or to become due to the [debtor], except such as may be by law exempt from execution.

S.D.C.L. § 21-18-12 (in pertinent part). This liability extends until the earnings holder files an answer. *Woodbine Savings Bank v. Yager*, 117 N.W. 761, 762 (S.D. 1931)(interpreting earlier version of § 21-18-12).

After the summons is served, the earnings holder and judgment debtor have thirty days to respond to the summons by affidavit or with the completed garnishment disclosure statement. S.D.C.L. §§ 21-18-26 and 27. If the earnings holder answers that he holds no funds that can be garnished, the action ceases unless the judgment creditor files a notice that issue is taken with the answer. S.D.C.L. § 21-18-30. If the answer admits the judgment creditor's allegations or if no answer is filed, the creditor may seek a judgment. S.D.C.L. §§ 21-18-31 or 39. Conversely, either

the earnings holder or judgment debtor may defend the garnishment action. S.D.C.L. §§ 21-18-42 and 43. The matter may then go to a jury trial. S.D.C.L. §§ 21-18-44, 46, and 47. Only the entry of a judgment discharges the earnings holder from any liability to the judgment debtor. S.D.C.L. § 21-18-48.

If the earnings holder answers that he does indeed hold funds that may be garnished, then he must hold the funds until 180 days from the date the summons was served or until the judgment creditor serves him with a levy, the debtor authorizes the release of the funds, or the court orders a release. S.D.C.L. § 21-18-33. If the earnings holder does not receive a levy or an order directing the release of the funds or if the debtor does not authorize the release of the funds, the funds are returned to the debtor when the 180 days expire. *Id.*

As to a debtor's garnished earnings, no general exemptions apply. S.D.C.L. §§ 21-18-53 and 43-45-14. Instead, a formula establishes the maximum amount that is subject to garnishment. S.D.C.L. §§ 21-18-51 and 52.

Chapter 21-18 of the South Dakota Codified Laws does not specifically provide that the garnishment summons creates a lien in favor of the judgment creditor who served the summons.[1] Older state court decisions present differing interpretations. *See Bank of Centerville v. Gelhaus*, 242 N.W. 642, 643 (S.D. 1932)(under predecessor to § 21-18-12, concluded that lien was created upon

---

[1] Under S.D.C.L. § 21-18-50, the earnings holder receives a possessory lien for any storage or maintenance costs.

service of a *prejudgment* garnishment summons); *Anderson v. Billingsly*, 189 N.W. 986, 987 (S.D. 1922)(garnishment lien only presumed for purpose of discussion but declared void by petition under Bankruptcy Act); and *Bowman v. Larsen*, 220 N.W. 489, 490 (S.D. 1928)(under predecessors to S.D.C.L. §§ 21-18-32 and 33 and a repealed exemption statute, concluded that garnished property is held *in custodia legis* from date summons is served). However, S.D.C.L. § 21-18-14.1 does provide that the creditor may have a "sixty-day continuing lien" on wages by requesting it in his summons. Upon receipt, the earnings holder collects nonexempt funds during that sixty-day period. *Id.* When the lien expires, the judgment creditor serves an additional disclosure form upon the earnings holder and the earnings holder than makes a further disclosure within ten days. The creditor still must obtain a levy or order for release of the funds if the debtor does not consent to their release. S.D.C.L. § 21-18-33.

PROPERTY OF THE BANKRUPTCY ESTATE. Property of a bankruptcy estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1).

> The scope of the paragraph is broad. It includes all kinds of property, including tangible and intangible property, cause of action . . . and all other forms of property specified in Section 70(a) of the Bankruptcy Act. . . . [I]t includes as property of the estate all property of the debtor, even that needed for a fresh start.

S.Rep. No. 989, 95th Cong., 2d Sess. 823, *reprinted in* 1978 U.S.Code Cong. & Ad.News 5787, 5686; H.R.Rep. No. 595, 95th Cong.,

1st Sess. 367-68 (1977), *reprinted in* 1978 U.S.Code Cong. & Ad.News 6322-24 (cited in *Samore v. Graham (In re Graham)*, 726 F.2d 1268, 1270 (8th Cir. 1984)).

State law must be consulted to determine the debtor's interest on the petition date. *In re Becker*, 217 B.R. 231, 235 (Bankr. M.D. Tenn. 1998)(discussing *United States v. Whiting Pools, Inc.* 103 S.Ct. 2309, 2316-17 (1983)); *SFS Technologies, Inc. v. Baker Material Handling Corp.*, 153 B.R. 148, 151 and 152 (Bankr. E.D. Pa. 1993). More particularly, state law will determine whether a pre-petition seizure of property transferred ownership of that property pre-petition so as to remove it from the bankruptcy estate. *Becker*, 217 B.R. at 235; *SFS Technologies*, 153 B.R. at 151-52. If the debtor was not divested of title by the pre-petition judgment enforcement action, the property becomes property of the bankruptcy estate. If legal title transferred pre-petition but the debtor still retained some interest in or right to that property, such as a right to redeem, then the bankruptcy estate likewise includes that retained right or interest. *Becker*, 217 B.R. at 235; *see also Whiting Pools*, 103 S.Ct. at 2316. Whatever that interest is, it must be turned over to the trustee when the petition is filed. 11 U.S.C. §§ 542(a) or 543(b). *Whiting Pools*, 103 S.Ct. at 2314 (limited exceptions set forth at n.12).

III.

PROPERTY OF THE ESTATE. Midwest's initial argument is that the automatic stay does not apply because the earnings are not property

of the bankruptcy estate and that its cause of action concerns only Mid-America, not Debtor, as espoused in *Wasserburger II*, 502 N.W.2d at 258-59. As discussed above, the threshold question is what was the status of the wages under state law on the petition date. South Dakota law does not remove title to garnished funds from a debtor until a levy or order is presented to the creditor. S.D.C.L. § 21-18-48. Since Mid-America was not presented with either a levy or an order before the petition was filed, the garnished funds were still Debtor's property on the petition date and thus became property of the bankruptcy estate. *Whiting Pools*, 103 S.Ct. at 2313 (bankruptcy estate includes property secured to a creditor; creditor must look to Bankruptcy Code provisions to protect its interest rather than obtaining possession of the property); *In re Vetter*, 112 B.R. 301 (Bankr. S.D. Ia. 1990); *In re Weatherspoon*, 101 B.R. 533, 536-42 (Bankr. N.D. Ill. 1989); *see also In re Dencklau*, 158 B.R. 796 (Bankr. N.D. Ia. 1993)(sheriff's continuation of garnishment proceeding post-petition violated the automatic stay).

The Court further concludes that on the petition date Midwest did not have a statutory lien on the earnings.[2] The language of § 21-18-12 does not establish a lien on the creditor's behalf; it just creates an obligation from the earnings holder to the creditor. *First Potter County Bank v. Hogg (In re Hogg)*, 35 B.R.

---

[2] Midwest has not claimed that it obtained a judicial lien when it served the garnishment summons. *Compare Thomas*, 215 B.R. at 875; *In re Vasquez*, 205 B.R. 136, 138 (Bankr. N.D. Ill. 1997); *Vetter*, 112 B.R. at 303; *Weatherspoon*, 101 B.R. at 535-37.

292, 296 (Bankr. D.S.D. 1983). This conclusion is supported by § 21-18-48, which provides that the debtor retains his interest in the earnings until a garnishment judgment is entered; by § 21-18-33, which provides that the funds will be returned to the debtor if the creditor does not obtain a levy or order completing the garnishment before 180 days expires; and by S.D.C.L. §§ 15-18-21 and 15-18-30, which provide that an execution does not constitute a lien on personal property until a levy has been made and that a levy on personalty capable of manual delivery must be made by taking possession of the property. *Hogg*, 35 B.R. at 296-97. Moreover, the liability created by § 21-18-12 extends only until the earnings holder answers the summons. S.D.C.L. § 21-18-30; *Woodbine Savings Bank*, 237 N.W. at 762 (S.D. 1931) (interpreting Rev. Code 1919, § 2464, the predecessor to § 21-18-30). *See Continental National Bank of Miami v. Tavormina (In re Masvidal)*, 10 F.3d 761, 763-64 (11th Cir. 1993)(Florida statute similar to S.D.C.L. § 21-18-12 does not create lien upon service of garnishment summons).

Even if a statutory lien is presumed, Midwest failed to perfect that interest *pre-petition* by completing the garnishment action and obtaining possession of the earnings. S.D.C.L. § 15-18-20; *Hogg*, 35 B.R. at 296. Midwest also failed to perfect any lien *post-petition* by filing a notice in bankruptcy before the 180 day period set forth in S.D.C.L. § 21-18-33 expired on January 5, 1998. While such a post-petition perfection may have been possible through 11 U.S.C. § 546(b) to countermand any "strong

arming" by the trustee under §§ 544(a)(1) or (2) or § 545(2), Midwest missed that opportunity. *See Marine Midland Bank v. The Bennett Funding Group,* Inc., Bankr. No. 96-61376, slip op. (Bankr. N.D.N.Y. Aug. 11, 1997)(discussion of § 546(b)).

It is important to note that the trustee does not need to resort to any strong arm powers to recover the garnished earnings from Mid-America. Those funds, as property of the bankruptcy estate, should have been turned over by Mid-America when the bankruptcy case commenced. 11 U.S.C. §§ 542(a) or 543(b).

Midwest's reliance on *Wassenburger II* is misplaced because the court in *Wassenburger II* too broadly relied on *United States v. Allen Brothers of Homer, Inc.*, 36 B.R. 920, 922 (D.C. 1984). In *Allen Brothers,* an employer failed to withhold any of the judgment debtor's wages despite being served with garnishment interrogatories under the governing state's garnishment laws. *Allen Brothers*, 36 B.R. at 921. Instead, the earnings holder paid all the funds to the debtor. *Id.* The creditor obtained a show cause order against the earnings holder seeking a judgment for the funds *not* withheld. *Id.* The judgment debtor later became a debtor in bankruptcy. *Id.* The United States District Court concluded that the automatic stay in bankruptcy did not stay the show cause hearing against the employer because funds of the debtor were not at issue. *Id.* at 922-24. The debtor, and thus his bankruptcy estate, already had possession of all the wages; the creditor was going after the employer's own funds. *Id.* In contrast in this

case, Mid-America does hold funds of the bankruptcy estate and Mid-America did not incur any separate liability to Midwest by failing to comply with South Dakota's garnishment laws before Debtor filed bankruptcy. *See Moran v. Saxenian Properties (In re Moran)*, 112 B.R. 197, 200 (Bankr. S.D. Tex. 1989)(similar distinctions made regarding *Allen Brothers* case).

Since Midwest does not hold any garnishment lien or some other special interest in the garnished funds, the Court cannot find any grounds on which to grant Midwest relief from the automatic stay regarding the funds held by Mid-America. Midwest's claim will be treated with other similarly situated creditors.[3]

EXCEPTION TO A PREFERENCE ACTION. Midwest's second argument is that no preference action can be maintained against it because 11 U.S.C. § 547(c)(8) excepts from turnover any preferential payments that do not exceed $600.00. Midwest correctly interprets § 547(c)(8). *See Roberts v. Bill Summers Motors, Inc. (In re Roberts)*, Bankr. No. 93-50083, Adversary No. 93-5010 (Bankr. D.S.D. October 27, 1993). However, neither the case trustee nor Debtor has commenced against Midwest an adversary to void any preferential transfer of estate funds because the funds are in Mid-America's hands. Accordingly, the exceptions to a preference action do not come into play. *See Thomas*, 215 B.R. at 875-76.

CLAIM OF EXEMPTIONS. Midwest is also correct that state law does

---

[3] Midwest and other judgment creditors may have a judgment lien on any non exempt real property of the estate. S.D.C.L. § 15-16-7.

not provide any exemptions for garnished wages except S.D.C.L. §§ 21-18-51 and 21-18-52. Both S.D.C.L. § 21-18-53 and § 43-45-14 state,

> The earnings of a debtor are exempt from process or levy only to the extent provided in §§ 21-18-51 and 21-18-52.

Thus, both § 21-18-53 and § 43-45-14 preclude Debtor from declaring his wages exempt under S.D.C.L. § 43-45-4.[4]

An order shall be entered denying Midwest's relief from stay motion and ordering Mid-America to turnover the garnished earnings to the case trustee.

Dated this 8 day of May, 1998.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk

By: Deputy Clerk
(SEAL)

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered
MAY 08 1998
Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

CERTIFICATE OF SERVICE
I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to those creditors and other parties in interest identified on the attached service list.
Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota
By: P.J.
Date: 5-08-98

[4] Debtor has not yet formally amended his schedules to claim the garnished wages exempt. He indicated at the hearing that he intended to do so.

Case: 97-10300 Form id: 122 Ntc Date: 05/08/98 Off: 3 Page : 1
Total notices mailed: 5

Debtor	Swanson, Lynn Keith	1201 8th Ave. NE #23, Aberdeen, SD 57401
Aty	Turner, Randall B.	202 South Main Street, #600, Aberdeen, SD 57401
Trustee	Pfeiffer, William J.	PO Drawer 1585, Aberdeen, SD 57401
Aty	Gering, Bruce J.	Office of the U.S. Trustee, #502, 230 South Phillips Avenue, Sioux Falls, SD 57104-6321
Aty	Hyde, Kent	1001 First Ave. SE, Aberdeen, SD 57401-4702