UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

IN RE:	)	CASE NO. 87-10326
	)	Adversary 87-1042
ALVIN RAYMOND BAUER and	)	
DELORIS LA RYNE BAUER,	)	
	)	CHAPTER 12
Debtors.	)	
	)	
ALVIN RAYMOND BAUER and	)	
DELORIS LA RYNE BAUER,	)	MEMORANDUM DECISION
	)	
Plaintiffs,	)	
vs	)	
THE UNITED STATES OF AMERICA,	)	
acting by and through the	)	
Small Business Administration,	)	
	)	
Defendant.	)	

This decision constitutes the Court's reconsideration of an earlier unpublished letter opinion and order avoiding an offset.

Facts

The case is presented on a stipulated record. As of November 2 1937 the Debtors owed Small business Administration $44,759.21. The loan has been in default since December 1, 1984. On October 2, 1987, the Agricultural Stabilization and Conservation Service - Commodity Credit Corporation transferred two checks totalling $2,9O5.O6 to the SBA to partially satisfy the Bauers' SBA debt. The checks represented the Debtors' entitlement under a 1986 farm procedures required to "perfect" this right of offset were completed not later than May 4, 1987.

The Bauers filed their chapter 12 Petition November 11, 1987, and now are debtors in possession. Shortly after filing they

commenced the present adversary proceeding to avoid the interagency offset and recover the $2,905.06.

Rinehart

The issues raised in the Bauers' adversary cannot be decided without consulting the two Rinehart opinions recently issued by the Bankruptcy Court and District Court of this district. Rinehart involved an offset between the same agencies presently before this Court. In the original In ire Rinehart, 76 B.R. 746 (Bkrtcy. D.50. 1987) Judge Peder K. Ecker of the Bankruptcy Court held that because the ASCS-CCC owed the debtors, and the debtors owed the SBA as opposed to the ASCS-CCC, there was no mutuality of the debts offset as required by Section 553(a) of the Bankruptcy Code. This opinion was handed down prior to this court's first consideration of the Bauers' adversary. In the original Bauer decision, this Court stated it would follow Judge Ecker's lead, at least until the matter was settled on appeal. Accordingly, the offset in the present case was disallowed for a lack of mutuality, and on the alternative grounds that the interagency transfer constituted a voidable preference under Section 547.

Chief District Judge Donald J. Porter shortly thereafter reversed Judge Ecker's Rinehart mutuality holding, ruling "the SBA and the ASCS—CCC stand in the same capacity" and the agencies should not be distinguished for offset purposes.[1] In re Rinehart,

[1] Only the mutuality holding was reversed. The ruling that SBA's offset constituted a willful violation of the automatic stay, and the imposition of damages for this violation were affirmed. The SBA has appealed this affirmance to the Eighth Circuit Court of Appeals.

88 B.R. 1014, 1018 (1988). Instead, the agencies should be considered part of a larger single entity – the United States government. Shortly after this appellate ruling was handed down, SBA timely moved for reconsideration of this Court's earlier order in this case.

Analysis

For this Court's purposes, Judge Porter's Rinehart decision settles the mutuality issue. The offset in question must now be viewed as the offset of mutual debts, placing the transaction within the purview of Section 553. Because the validity of the application of the ASCS-CCC benefits to the SBA debt is governed by this Section, on this reconsideration the offset cannot be attacked as a voidable preference under Section 547 of the Bankruptcy Code. 11 U.S.C. §553(a); In re Braniff Airways, Inc., 814 F.2d 1030 (5th Cir. 1987); Lee V. Schweiker, 739 F.2d 870 (3rd Cir. 1984). See also Smith v. Mark Twain Nat. Bank, 805 F.2d 278, 289 (8th Cir. 1986).

On this reconsideration the Bauers challenge the offset under the "improvement of position test" of Section 553(b). This subsection provides in relevant part:

> [I]f a creditor offsets a mutual debt owing to the debtor against a claim against the debtor on or within 90 days before the date of the filing of the petition, then the trustee may recover from such creditor the amount so offset to the extent that any insufficiency on the date of such setoff is less than the insufficiency on the later of – –

> (A) 90 days before the date of the filing of the petition; and
>
> (B)the first date during the 90 days immediately preceding the date of the filing of the petition on which there is an insufficiency.
>
> (2) In this subsection, 'insufficiency means amount, if any, by which a claim against the debtor exceeds a mutual debt owing to the debtor by the holder of such claim.

By its terms Section 553(b) is concerned only with an offset which occurred "on or within 90 days before the date of the filing of the petition." The parties frame the issue as turning on this quoted language. The Bauers allege the offset did not occur until the checks were physically transferred from agency to agency. This transferal occurred within the ninety day prepetition period. According to the SBA, the offset occurred when the acts required by administrative regulations to "perfect" the right of offset were completed. This is stipulated to have occurred prior to the ninety day reachback period.

The Debtors contend that the check transferal date is the day of offset and this offset worked an avoidable improvement of position. The Debtors apply the improvement of position test as follows. On the 90th prepetition day the insufficiency owed the SBA was $44,759.21. The Debtors made no payments during the reachback period. On the day the agencies exchanged the checks, for purposes of this argument the day of the setoff, the insufficiency owed the SBA was $44,759.21 minus $2,905.06, which equals $41,854.15. By this reasoning the improvement of position is the $2,905.06 offset.

This analysis improperly focuses on the SEA to the exclusion of the ASCS—CCC. In doing so, it ignores Judge Porter's Rinehart ruling that the agencies stand in the same capacity for offset purposes. It would be inconsistent to include the agencies as a single governmental entity for purposes of Section 553(a), as Judge Porter requires, and then distinguish the agencies when applying the improvement of position test of Section 553(b). Both agencies must be included in applying the test.

Applying the Rinehart interpretation of mutuality there was no improvement of position. On the 90th day prior to the petition the insufficiency owed the agencies or government equalled the $44,759.21 the Bauers owed SBA, minus the $2,905.06 the ASCS-CCC owed the Debtors, which equals $41,854.15. On the day the checks were transferred (if this is viewed as the day of setoff) the insufficiency owed the agencies or government was $44,759.21, minus $2,905.06, which equals $41,854.15. In other words, the insufficiency is identical at the two relevant dates.

The difference between this application of the improvement of position test and the Debtors' application is that by excluding the ASCS-CCC from the analysis, the Debtor increased the insufficiency at the ninety day point by the amount this agency owed the Debtors. This has the effect of decreasing the insufficiency at the alleged setoff date when the ASCS-CCC payment is subtracted from the SBA insufficiency.

As is demonstrated above, even if the Court accepts the Debtors' version of the date of offset, Section 553(b) would not work an avoidable improvement of position. As the date of offset is

therefore irrelevant in this case, the Court need not express an opinion in this regard.

This matter constitutes a core proceeding under 11 U.S.C. Section 157. Because the relevant facts are entirely stipulated to, findings of fact are not required. Mason, 69 B.R. 876 (Bkrtcy. E.D. Pa. 1987). This opinion shall serve as conclusions of law. The Court shall enter an order dismissing the Debtors' complaint without costs.

Dated this 18th day of November, 1988

BY THE COURT

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:
PATRICIA MERRITT, CLERK

By_____
Deputy Clerk

(SEAL)