UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
ROOM 211
FEDERAL BUILDING AND U.S. POST OFFICE
225 SOUTH PIERRE STREET
PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

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July 7, 1988

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Re: Alvin and Debris Bauer
Chapter 12
87-10326 Adv. 87-1042

Gentlemen:

I have considered the record and briefs submitted in this matter and render the following decision.

This case is presented on the stipulated record. The issue I must decide is whether an offset of ASCS payments owed to the Debtors against a debt owed by the Debtors to SBA is avoidable in bankruptcy, where all administrative procedures necessary to establish the right to setoff were completed prior to the ninety day pre-petition period, but the actual payment of the setoff by check occurred within the ninety day period. The discussion which follows concludes the transfer of the check was a voidable transfer under the bankruptcy code.

The parties' arguments concentrate on Section 547, which deals with avoidable preferences and largely ignore Section 553, which governs the right of setoff. However, the precise transaction in question has already been held to be a setoff by Judge Ecker, In re Rinehart, 76 B.R. 746 (Bkrtcy. D.S.D. 1987), and both parties characterize it as such. Therefore, Section 553 must first be consulted, because to the extent a transaction qualities as a valid setoff under this section, it is not assailable under Section 547. 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 (8th Cir. 1986).

Section 553 allows a setoff at a pre-petition debt against a pre-petition claim where the obligations are "mutual." In Rinehart, Judge Ecker held the

> SBA does not have a right to offset its prefiling claims against ASCS-CCC farm payments because the ASCS-CCC, and not the SBA, owes payments to the debtors and, therefore, this is not a "mutual debt owing by such creditor" under Bankruptcy Code Section 553(a).

76 B..R. at 749. The case is factually indistinguishable from the present.[1] Rinehart is contrary to prior authority, In re Pinkert, 75 B.R. 218 (Bkrtcy. N.D. Tex. 1987) ; In re Buske, 75 B.R. 213 (Bkrtcy. N.D. Tex. 1987), has been subsequently rejected, In re Hazelton, 17 B.C.D. 680 (Bkrtcy. E.D. Mich. 1988); In re Thomas, 84 BR. 438 (Bkrtcy. ND. Tex. 1988); In re Britton, 83 B.R. 914 (Bkrtcy. E.D. N.C. 1988), but also followed, In re Butz, 1988 I'LL. 45737 (Bkrtcy. S.D. Ia. 1988). I will not undertake an analysis here which may lead to acceptance or rejection at Rinehart, but will simply apply the case. The interests of intradistrict consistency are strong. Also, Rinehart is currently on appeal before Chief District Judge Porter, and this Court will have its answer soon enough.

I first hold this transaction does not qualify as a valid setoff under Section 553. It follows from this that a strong argument could be made that it an offset is invalid under Section 553, it is unnecessary to attempt to invalidate it a second time under Section 547. But see Section 550(a). As the Third Circuit remarked in Lee, 1739 F.2d at 873, note 4,

> Section 547 deals with preferential transfers. Although setoffs might otherwise be treated as preferential transfers, section 547 is not applicable because section 553(a) provides that:
>
> > Except for as otherwise provided in this section and in section 362 and 363 of this title, this title does not affect any right of a creditor to offset [. ..]
> >
> > . . .
>
> Our reading of this language is that, where a setoff right is being asserted, section 553,

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[1] In Rinehart the ASCS-CCC check was of [set postfiling instead of prefiling. However, the fact that the setoff was postfiling was grounds only for holding the government violated the automatic stay, and was not material in holding the offset was not available.

> rather than section 547, governs the creditor's rights. See FDIC v. Bank of America, 701 F.2d 831, 836 (9th Cir. 1983).

Or, as William L. Norton, Jr., author and editor-in-chief of the Norton Bankruptcy Code Pamphlet states in his editor's comment to Section 101(50), which defines "transfer"

> Congress deleted setoff from the definition of transfer under §101(50) of the Code, thereby leaving untouched the case law to the effect that a transfer does not include a setoff, at least for preference purposes, and amended §553(b), applying the improvement of position test to any setoff made within three months of the petition.

Id. 1987-88 Ed. at 52. It would appear, SBA must sink or swim under Section 553, and Judge Ecker has already handed it an anvil in the form of the Rinehart decision.

Furthermore, even if viewed as a transaction subject to Section 547(b), I hold the transfer voidable.[2] The section has five subparts of which only subpart (4) is in question. Under Section 547(b) (4) (A) the "transfer of an interest of the debtor in property" must occur "on or within 90 days before the date of the filing of the petition." Subsection (e) of the statute sets out when a transfer is made. After considerable research and examining the parties' briefs, no authority on point is before the Court. This may be because the case is more properly venued within Section 553.

As framed by the *parties,* the issue is whether the "transfer of an interest of the debtor in property" occurred prior to the ninety day preference period when the government "perfected" its right to setoff through administrative procedures, or whether the "transfer" occurred within the preference period when the check was delivered from the ASCS to the SBA. Mindful of the Code's broad definition of "transfer", see Section 101(50); collier para. 547.03[1], I nonetheless hold that the prepreference period administrative procedures did not affect a "transfer" of an interest of the debtor in property. Rather, these procedures set the method by which that transfer would occur in the future. The actual transfer occurred no earlier than delivery of the check, which fell within the preference period.

An analogous case is In re Mason, 69 B.R. 876 (Bkrtcy. E.D. Pa. 1987). In Mason, the creditor was the debtor's landlord. Prior

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[2] Because historical facts are not in question, determining when the transfer took place is a question of law. In re Newcomb, 744 F.2d 621 (8th Cir. 1989).

to the preference period the debtor deposited rent in a bank account pending the outcome of landlord-tenant litigation. The debtor transferred the "escrowed" funds by check to the landlord within the preference period. The rent was paid pursuant to a prepreference period Court Order enforcing a stipulation entered into prior to the preference period, and included rent due prior to the preference period. Judge Scholl held, after examining cases involving payment of debts by check, "that a transfer, for purposes of Section 547(b), can never be said to occur earlier than the physical transfer of funds by the debtor to the creditor, and may in fact be held to occur considerably thereafter." 69 B.R. at 884 (emphasis in original). See also In re Jameson's Foods, Inc., 35 B.R. 433 (Bkrtcy. D.S.C. 1983). The stipulation or order giving the creditor the right to receive the payments, analogous to the administrative "perfection" in this case, was not a "transfer".

An additional analogous opinion was authored by the United State District Court of Nevada in In re Matter of R & T Roofing Struct. & Commercial Fran., 79 BA?. 22 (1987). In this case the Internal Revenue Service perfected its lien for unpaid withholding taxes before the preference period. The actual seizure of the funds occurred within the ninety day period. Again, the Court held the exchange of the money to be the "transfer," not the prior perfection which otherwise fixed the agency's right to the money.

I believe my holding is also within the purpose of the preference statute. Clearly, the purpose of the statute is to prevent a creditor from receiving a greater recovery in bankruptcy than similarly situated creditors. 2 Norton Bankruptcy Law and Practice, Section 32.01 (1981). SBA has essentially stipulated that it is receiving more by the setoff than it would have otherwise. See also Debtors' Amended Chapter 12 Plan of Reorganization; Pre—Trial Statement at paragraph V. SEA is apparently totally unsecured. It should be noted that had the payment been made on the same date directly by the Debtor instead of the ASCS, it unquestionably would have been a preference within Section 547. Finally, allowing the offset would raise the "[s]erious bankruptcy reorganization policy concerns" discussed by Judge Ecker in Rinehart. 76 BA?. at 759.

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. This opinion shall serve as conclusions of law. Counsel for the Debtors is requested to supply an appropriate order. See Bankruptcy Rule 9021.

Very truly yours,

Irvin N. Hoyt
Bankruptcy Judge

INH/sh

CC: Bankruptcy Clerk