

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Southern Division

In re:) Bankr. No. 00-40405
) Chapter 7
FINESHA RANDLE DAWSON)
f/k/a Finesha Randle) DECISION RE: TRUSTEE'S
Soc. Sec. No. [REDACTED]-1994) MOTION TO APPROVE SETTLEMENT
) REGARDING EXCESS EXEMPTIONS
Debtor.)

The matter before the Court is the Motion to Approve Settlement of Debtor's Excess Non-exempt Personal Property filed by Trustee Lee Ann Pierce and the objection filed by Dr. Lyle Van Hemert, a creditor. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Decision and accompanying Order shall constitute the Court's findings and conclusions under Federal Rule of Bankruptcy Procedure 7052. As set forth below, the Court concludes that Trustee Pierce's proposed settlement of Debtor's excess exemptions must be approved.

SUMMARY OF MATERIAL FACTS.

Finesha Dawson ("Debtor") filed a Chapter 7 petition. Among her schedule of general unsecured creditors, Debtor included "VanHemert Chiropractor" for \$5,000.

Debtor later amended her schedule of assets to include personal injury law suit proceeds estimated at \$6,000. She also declared those proceeds exempt. Trustee Pierce thereafter filed an objection to Debtor's claimed exemptions on the grounds that Debtor had exceeded by \$4,675 her allowed exemptions under S.D.C.L. § 43-45-4. Debtor filed a response asking that a hearing be held to determine how much of the \$6,000 in the law suit proceeds she could keep.

A hearing was held. The Trustee reported that the parties had reached a settlement. A written stipulation was filed. It provided that Debtor could keep the first \$2,750 of any personal injury

lawsuit proceeds she received. The balance would go to the bankruptcy estate.

Trustee Pierce noticed the settlement for objections. Dr. Van Hemert filed a letter objection.¹ He said Debtor, before she filed bankruptcy, assigned any personal injury law suit proceeds to his office up to the amount of the debt she incurred there. He cited a state court decision in support of his contention. Attached to Dr. Van Hemert's objection was a copy of document entitled ASSIGNMENT OF PROCEEDS. The document provided that Debtor had agreed to "IRREVOCABLY SELL, ASSIGN, TRANSFER AND SET OVER TO VAN HEMERT CHIROPRACTIC OFFICE all my rights, title, and interests in and to any settlement, judgment, or recovery from State Farm-Insured James [illegible] S R claim # 46-0062-001 to the extent of any unpaid chiropractic charges owed by [Debtor] to Van Hemert Chiropractic Office." The agreement included a similar provision in which Debtor sold, assigned, transferred and set over to Dr. Van Hemert any insurance policy proceeds "which indemnifies the above-named person in the event of such settlement judgment or recovery . . . or which provides coverage for [Debtor]." The agreement also provided:

IN CLARIFICATION OF THE FOREGOING, it is hereby agreed that [Debtor] shall at all times remain the real party in interest in the said claim or lawsuit, and no such rights to a cause of action shall inhere to the Van Hemert Chiropractic Office as a result of this assignment. **Van Hemert Chiropractic Office's interest in the proceeds is the equivalent of an equitable assignment, lien, or other**

¹ The letter was erroneously addressed to Assistant United States Trustee Bruce J. Gering. He forwarded the letter to the Court for filing.

security arrangement confined solely to the unpaid balance of its charges for chiropractic services rendered in treatment of the patient for matters related to the personal injury suffered by the patient at the hands of a third party tortfeasor. This is not an assignment of a cause of action in personal injury. Any construction of this document as an assignment of a cause of action shall render this assignment unenforceable to that extent as between the patient and Van Hemert Chiropractic Office and any such unenforceability shall not affect the security interest created hereunder. [Emphasis added.]

Attached to the agreement was a copy of a notice acknowledging the agreement, but the party to whom the notice was given is illegible.

A hearing on Trustee Pierce's motion to approve the settlement and Dr. Van Hemert's objection was held. At the hearing, Dr. Van Hemert stated that the relevant insurance company, State Farm, had received notice of the agreement. He said he was owed \$6,075.11. Trustee Pierce acknowledged she has received \$3,794 in settlement proceeds. She argued that the pre-petition agreement between Debtor and Dr. Van Hemert did not completely transfer Debtor's interest in any lawsuit or insurance proceeds but merely gave Dr. Van Hemert a security interest in them to the extent of his unpaid bill.

DISCUSSION.

The issue presented is the effect of the pre-petition agreement between Debtor and Dr. Van Hemert. The terms of the agreement answer the question.

When only the first two paragraphs are read, it appears that Debtor completely transferred to Dr. Van Hemert her interest in either lawsuit or insurance proceeds to the extent of her bill for chiropractic services. However, the third paragraph specifically

clarifies the first two paragraphs and states that Dr. Van Hemert's interest under the agreement is akin to a lien or security arrangement. Since the agreement is really a lien or security agreement, rather than an outright sale or transfer, state law says that no title to the property passed to Dr. Van Hemert. S.D.C.L. § 44-1-7. These funds (or the right to receive the funds) thus became property of the bankruptcy when Debtor filed her petition, 11 U.S.C. § 541(a)(1), and Debtor is able to exempt a portion of these funds to the extent that she has value left under S.D.C.L. § 43-45-4. That is essentially what the Trustee has proposed in her settlement. Since Dr. Van Hemert has not challenged the appropriateness of the settlement itself -- he only challenged Debtor's interest in the subject proceeds -- the Court concludes that there is no longer any basis on which to deny Trustee Pierce's motion to approve the settlement.


Dr. Van Hemert is correct that Judge Gene Paul Kean of the Second Judicial Circuit of South Dakota has ruled that certain assignments of insurance benefits are valid in South Dakota. *Unruh v. Bonacker, et. al*, Civ. No. 94-3278, slip op. (S.D. 2nd Cir. July 25, 1995); see also S.D.C.L. § 58-17-61 (assignment of health insurance proceeds to certain hospitals). In *Unruh v. Bonacker*, however, the agreement between the health care provider and the insured was, based on the terms of the agreement quoted in the decision, a true assignment, not a security agreement as Dr. Van Hemert obtained from Debtor.

Further, the Court concludes that Dr. Van Hemert's lien on the settlement funds does not give him a priority claim on the funds over other bankruptcy creditors. ² To have priority in the funds, state law required Dr. Van Hemert to give others notice of his security interest by filing the lien or a notice with the local register of deeds. See S.D.C.L. §§ 44-2-1, 3, 5, and 8.³ Since he did not do that before the petition date, Trustee Pierce's strong arm powers under 11 U.S.C. § 544 renders Dr. Van Hemert's claim unsecured, and the claim must be treated equally with all other unsecured claims.

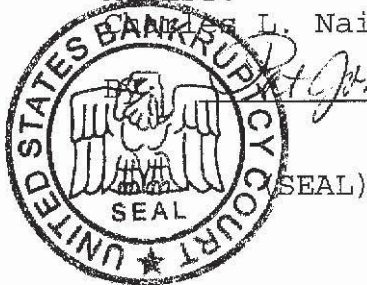
An order approving the settlement will be entered.

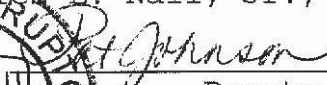
So ordered this 6th day of December, 2000.

BY THE COURT:


Irvin N. Hoyt
Bankruptcy Judge


ATTEST:



Charles L. Nail, Jr., Clerk

Deputy Clerk

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

DEC 07 2000

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

NOTICE OF ENTRY
Under F.R. Bankr.P. 9022(a)
Entered

DEC 07 2000

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

² Technically, the priority of Dr. Van Hemert's lien should have been determined in a separate adversary proceeding. Such a proceeding would have only increased costs for both parties with no change in the result.

³ The agreement is excluded from the Uniform Commercial Code pursuant to S.D.C.L. § 57A-9-104(7) and (11).

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Total notices mailed: 6

Debtor Dawson, Finesha Randle 2011 S. Grange, Sioux Falls, SD 57105

Aty Blake, Thomas A. #202, 505 W. 9th St., Sioux Falls, SD 57104

Trustee Pierce, Lee Ann PO Box 524, Brookings, SD 57006

Aty Bengford, Stephanie C. Assistant U.S. Attorney, PO Box 5073, Sioux Falls, SD 57117-5073

Aty Gering, Bruce J. Office of the U.S. Trustee, #502, 230 South Phillips Avenue, Sioux Falls, SD 57104-6321

Creditor Van Hemert, D.C., Lyle 3508 South Western Ave., Sioux Falls, SD 57104