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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December 3, 1999

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Subject: ***Lovald v. Credit Collection Services, Inc.*** ***(In re Deborah Maxwell)***, Adversary No. 99-4022; Chapter 7; Bankr. No. 97-40596

Dear Counsel:

The matters before the Court are the parties' cross motions for summary judgment.[1] This is a core proceeding under 28 U.S.C. § 157(b)(2)(F). This letter decision and subsequent order and judgment shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that Plaintiff-Trustee John S. Lovald is not entitled to recover as a preference certain sums received by Defendant Credit Collection Services, Inc. Summary judgment shall therefore be entered for Defendant Credit Collection Services, Inc.

Summary of facts. After obtaining a judgment against her in state court, Credit Collection Services, Inc. ("Credit Collection") garnished Deborah Maxwell's wages. Pursuant to that garnishment, WNAX, a radio station in Yankton and Maxwell's employer at the time, issued four checks to Credit Collection: one dated April 22, 1997 for $282.00; one dated May 20, 1997 for $282.00; one dated June 20, 1997 for $282.16; and one dated July 1, 1997 for $282.16. Credit Collection cashed only the first two checks.

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[1] While Credit Collection did not file a formal motion for summary judgment, it did request such relief in its brief in opposition to Trustee Lovald's motion for summary judgment.

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On June 30, 1997, Maxwell ("Debtor") filed a petition for relief under Chapter 13. On July 9, 1997, Credit Collection forwarded the July 1997 check to the Chapter 13 Trustee. On that same date, Credit Collection also forwarded a Release in Garnishment to WNAX.

Debtor's case was converted to Chapter 7 on April 24, 1998. John S. Lovald was appointed as the Chapter 7 Trustee on that same date. Upon learning that Debtor's wages had been garnished, Trustee Lovald demanded that Credit Collection turn over to him the sum of $895.05 (the April, May, and June 1997 checks).[2] Credit Collection denied having any garnished wages in its possession.

Following this exchange of several letters, Trustee Lovald filed a complaint against Credit Collection on August 6, 1999. In his complaint, Trustee Lovald alleged that WNAX's payments to Credit Collection constituted a preference and asked that judgment be entered against Credit Collection for $846.48. Credit Collection returned the uncashed June 1997 check to WNAX on August 13, 1999 and filed an answer on August 24, 1999. In its answer, Credit Collection admitted receiving only $564.32 (April and May 1997 checks) and alleged that Trustee Lovald's action was barred by the preference exception at 11 U.S.C. § 547(c)(8).

On October 18, 1999, Trustee Lovald filed a motion for summary judgment. His motion was supported by a memorandum and affidavits that were filed on October 14, 1999. On November 4, 1999, Credit Collection filed a brief in opposition to Trustee Lovald's motion and a supporting affidavit. The matter was taken under advisement.

Applicable Law. Summary judgment is appropriate when "there is no genuine issue [of] material fact and . . . the moving party is entitled to a judgment as a matter of law." F.R.Bankr.P. 7056 and F.R.Civ.P. 56(c). An issue of material fact is *genuine* if it has a real basis in the record. *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992) (quotes therein). A genuine issue of fact is *material* if it might affect the outcome of the case. *Id.* (quotes therein).

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[2] The amount in Trustee Lovald's demand was based upon Debtor's testimony at her § 341 meeting of creditors. There is also a $.16 discrepancy in some of the totals used by the parties. The parties now agree that the correct total for the April and May 1997 checks is $564 and the correct amount of the June 1997 check is $282.16.

The matter must be viewed in the light most favorable to the party opposing the motion. *F.D.I.C. v. Bell*, 106 F.3d 258, 263 (8th Cir. 1997); *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1490 (8th Circ. 1992) (quoting therein *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 587-88 (1986), and cites therein). Where motive and intent are at issue, disposition of the matter by summary judgment may be more difficult. *Cf. Amerinet*, 972 F.2d at 1490 (citation omitted).

The movant meets his burden if he shows that the record does not contain a genuine issue of material fact and he points out that part of the record that bears out his assertion. *Handeen v. LeMaire*, 112 F.3d 1339, 1346 (8th Cir. 1997 (quoting therein *City of Mt. Pleasant v. Associated Electric Coop*, 838 F.2d 268, 273 (8th Cir. 1988). No defense to an insufficient showing is required. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 156 (1970) (cite therein); *Handeen*, 112 F.3d at 1346.

If the movant meets his burden, however, the non movant, to defeat the motion, "must advance specific facts to create a genuine issue of material fact for trial." *Bell*, 106 F.3d at 263 (quoting *Rolscreen Co. v. Pella Products of St. Louis, Inc.*, 64 F.3d 1202, 1211 (8th Cir. 1995)). The non movant must do more than show there is some metaphysical doubt; he must show he will be able to put on admissible evidence at trial proving his allegations. *Bell*, 106 F.3d at 263 (citing *Kiemele v. Soo Line R.R. Co.*, 93 F.3d 472, 474 (8th Cir. 1996), and *JRT, Inc. v. TCBY System, Inc.*, 52 F.3d 734, 737 (8th Cir. 1995)).

A Chapter 7 trustee may avoid any transfer of the debtor's interest in property -

(1) to or for the benefit of a creditor;
(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
(3) made while the debtor was insolvent;
(4) made -
    (A) on or within 90 days before the date of the filing of the petition; or
    (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
(5) that enables such creditor to receive more than such creditor would receive if -
    (A) the case were a case under chapter 7 of [title 11];

> (B) the transfer had not been made; and
> (C) such creditor received payment of such debt to the extent provided by the provisions of [title 11].

11 U.S.C. § 547(b). However, a Chapter 7 trustee may not avoid the transfer, "if, in a case filed by an individual debtor whose debts are primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $600." 11 U.S.C. § 547(c)(8).

In determining whether § 547(c)(8)'s $600.00 threshold has been reached, the court may aggregate two or more transfers to the same creditor. *See Matter of Hailes*, 77 F.3d 873 (5th Cir. 1996); *In re Djerf*, 188 B.R. 586 (Bankr. D. Minn. 1995). If the threshold is reached, the trustee is entitled to recover the entire amount transferred, not just the amount in excess of $600.00. *See In re Yetter*, 112 B.R. 301 (Bankr. S.D. Iowa 1990); *In re Via*, 107 B.R. 91 (Bankr. W.D. Va. 1989).

Discussion. In this case, there is no dispute that Credit Collection received $564.00 within the 90 days prior to the filing of Debtor's bankruptcy. Both parties appear to presume - and in considering the parties' motions, the Court has therefore presumed - that but for § 547(c)(8), those transfers would constitute a preference within the meaning of § 547(b). The only issue framed by the parties' motions is whether the third check, which Credit Collection held without cashing for more than two years, should be added to the first two checks in determining the amount transferred to Credit Collection. If so, Credit Collection received $846.16, which Trustee Lovald would be entitled to recover. If not, Credit Collection received only $564.00, which Trustee Lovald would be barred from recovering by operation of § 547(c)(8).

The United States Supreme Court has held unambiguously that in the context of § 547(b), if a payment is made by check, there is no transfer until the check is honored by the bank against which it is drawn:

> We granted certiorari to decide whether, in determining if a transfer occurred within the 90-day preference period, a transfer made by check should be deemed to occur on the date the check is presented to the recipient or on the date the drawee bank honors it. We hold that the latter date is determinative.

Barnhill v. Johnson, 503 U.S. 393, 394 (1992). Trustee Lovald admits that Credit Collection never presented the third check for payment. That being so, the Court can only conclude that there was no transfer within the meaning of § 547(b). Credit Collection received - both as a matter of fact and as a matter of law - only $564.00, which is below § 547(c)(8)'s threshold. Thus, Trustee Lovald may not avoid the transfers to Credit Collection. Trustee Lovald's motion for summary judgment will be denied. Credit Collection's motion for summary judgment will be granted. The parties shall bear their own attorneys fees, costs, and disbursements.

Counsel for Defendant Credit Collection shall prepare an appropriate order.

Sincerely,

Irvin N. Hoyt
Bankruptcy Judge

INH:sh

cc: adversary file (docket original in adversary; serve copies on parties in interest in the adversary and the U.S. Trustee)

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 0 3 1999

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 0 3 1999

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

Case: 99-04022 Form id: 122 Ntc Date: 12/03/1999 Off: 4 Page : 1
Total notices mailed: 2

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