

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

TELEPHONE (605) 224-0560
FAX (605) 224-9020

IRVIN N. HOYT
BANKRUPTCY JUDGE

April 15, 2005

Forrest C. Allred, Esq.
Counsel for Plaintiff-Trustee
14 Second Avenue SE, Suite B
Aberdeen, South Dakota 57401

James R. Myers, Esq.
Counsel for Defendant Sioux Falls Federal Credit Union
Post Office Box 1085
Sioux Falls, South Dakota 57101

Subject: *Forrest C. Allred, Trustee v. Sioux Falls
Federal Credit Union (In re Shane R. Ortman),
Adversary No. 04-1023; Ch. 7, Bankr. No. 04-10263*

Dear Counsel:

The matter before the Court on stipulated facts and briefs is Trustee Forrest C. Allred's complaint against Sioux Falls Federal Credit Union seeking a turnover of certain preferential payments from Debtor Shane R. Ortman to the Credit Union. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and accompanying order shall constitute the Court's findings and conclusions under Fed.R.Bankr.P. 7052. As set forth below, Trustee Allred may recover the subject preferential transfers of garnished funds that were made to the Credit Union.

Summary. The parties filed the following stipulated facts:

Debtor Shane R. Ortman was indebted to Sioux Falls Federal Credit Union on a judgment that was entered against him on March 23, 2004. The unpaid amount of said judgment at time of filing was approximately \$7,000.00. On May 14, 2004, garnishment proceedings were commenced on the Debtor's wages at Angus-Palm Industries in Watertown, South Dakota. Angus-Palm Industries issued checks made payable to Myers, Peters, Hoffman, Billion & Pfeiffer pursuant to the garnishment that were received as follows: June 6, 2004--\$123.07; July 2, 2004--\$233.60; August 3, 2004--\$266.21. In each instance the aforesaid checks from Angus-Palm Industries were received by counsel for Defendant on the dates indicated above.

Re: Shane R. Ortman
April 15, 2005
Page 2

The first two checks were endorsed over to Sioux Falls Federal Credit Union by counsel for said Defendant. The final check was deposited in the trust account of James R. Myers, counsel for Defendant, and on August 3, 2004, \$242.21 was paid by counsel for Defendant to his client, Sioux Falls Federal Credit Union, and the remaining \$24.00 was refunded by counsel for Defendant to the debtor Shane R. Ortman. The Debtor deposited such check on August 9, 2004 in his bank. The Debtor filed a Chapter 7 bankruptcy on August 12, 2004, and was discharged on November 16, 2004.

In the 90 days prior to the bankruptcy filing, Angus-Palm Industries withheld a total of \$622.88 from the pay of Debtor Shane R. Ortman, all of which was remitted to counsel for Defendant by Angus-Palm Industries on the dates set forth above. Counsel for Defendant disbursed \$598.88 thereof to his client, Sioux Falls Federal Credit Union and counsel for Defendant also remitted to the Debtor \$24.00 on the date specified above. The amount of Debtor's debt to Defendant remaining unpaid, and discharged in bankruptcy, exceeds \$6,000.00.

At all times relevant to this proceeding, counsel for Defendant was acting as agent for Defendant. All of the remittances described herein meet the criteria specified by 11 USC §547(b).

The issue presented by the parties is whether these transfers are excepted from avoidance by 11 U.S.C. § 547(c)(8), which provides:

(c) The trustee may not avoid under this section a transfer--

(8) 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.

Trustee Allred argued that the "aggregate value" received by the Credit Union actually was \$622.88 and so the exception at § 547(c)(8) does not apply. The Credit Union argued that since \$24.00 was returned to Debtor before he filed bankruptcy, the aggregate value it received was only \$598.88, a sum that falls

Re: Shane R. Ortman
April 15, 2005
Page 3

under the exception at § 547(c)(8). In his reply brief, Trustee Allred alluded that the Credit Union's decision to remit \$24.00 to Debtor may have been intended to protect the remaining \$598.88 from an avoidance action.

Discussion. This Court has previously ruled that individual transfers within the preference period are totaled for purposes of applying § 547(c)(8). *Lovald V. Credit Collection Services, Inc., (In re Maxwell)*, Bankr. No. 97-40596, slip op. (Bankr. D.S.D. December 3, 1999). Further, the parties have stipulated that the transfers occurred when the Credit Union's attorney received the checks.¹ Thus, the only matter left to consider is whether the Credit Union's attorney's payment of \$24.00 to Debtor reduced the "aggregate value" of the transfers to less than \$600.00 so as to make applicable the preferential transfer exception provided by § 547(c)(8). The Court was unable to locate any reported decision where this exact issue was addressed.²

In light of the specific language of § 547(a)(8) as applied to the facts presented, the Court concludes that it must consider solely the transfers to the Credit Union. These transfers clearly aggregated more than \$600.00 within the preference period. That the Credit Union voluntarily paid over a small portion to Debtor (or some other person or entity) does not alter the fact that the preferential transfers to the Credit Union aggregated over \$600.00.

At most, the Credit Union's voluntary conveyance of \$24.00 to

¹ There is no acquiescence or assumption by the Court that the date the checks were received by the Credit Union's counsel is the date that the garnished wages were transferred for avoidance purposes under the Bankruptcy Code. See *James v. Planters Bank (In re James)*, 257 B.R. 673, 676 (B.A.P. 8th Cir. 2001); and *In re Lynn K. Swanson*, Bankr. No. 97-10300, slip op. (Bankr. D.S.D. May 8, 1998). Those dates are used in this adversary proceeding only because the parties agreed to them.

² A decision where some facts were similar is *Harr v. Paradigm Management Co. Flower Hill Apartments*, 1997 WL 441268, slip op. (Bankr. D. Md. July 24, 1997). There, the creditor returned garnished wages post-petition and the balance was reduced to \$600, not to less than \$600 as is required for application of the exception at § 547(c)(8).

Re: Shane R. Ortman
April 15, 2005
Page 4

Debtor may have made her a subsequent transferee for purposes of recovering the avoided transfer under 11 U.S.C. § 550(a)(2). Debtor, however, was not a party to this action, and Trustee Allred's ability under § 550(a)(1) to recover from the Credit Union, the initial transferee, is absolute. *Williams v. Mortillaro, et al. (In re Resource Recycling & Remediation, Inc.)*, 314 B.R. 62, 70 (Bankr. W.D. Pa. 2004) (citing *Abele v. Modern Financial Plans Services, Inc. (In re Cohen)*, 300 F.3d 1097, 1102 (9th Cir. 2002)). Accordingly, the Credit Union will be directed to return to the bankruptcy estate the full \$622.88 that it received preferentially. The Credit Union may explore whether it has a pre-petition claim against the estate for the \$24.00 it voluntarily gave to Debtor.

An appropriate order and judgment shall be entered.

Sincerely,



Irvin N. Hoyt
Bankruptcy Judge

INH:sh

CC: adversary file (docket original; serve parties in interest)

I hereby certify that a copy of this document was electronically transmitted, mailed, hand delivered or faxed this date to the parties on the attached service list.

APR 15 2005

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

APR 15 2005

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

Forrest C. Allred
14 Second Ave SE Ste B
Aberdeen, SD 57401

James R. Myers
#510, 300 N. Dakota Avenue
PO Box 1085
Sioux Falls, SD 57101-1085