

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE: ) In Proceedings  
) Under Chapter 7  
WILLIAM CLIFFORD BANKS and )  
CINDY LOU BANKS, ) BK No. 92-41560  
)  
Debtors. ) Adv. No. 92-4073  
)  
WILLIAM CLIFFORD BANKS and )  
CINDY LOU BANKS, )  
)  
Plaintiffs )  
)  
v. )  
)  
GRAY HUNTER STENN, )  
)  
Defendant. )

OPINION

Debtors, William Clifford Banks and Cindy Lou Banks, initiated this adversary proceeding seeking turnover of certain monies in the hands of defendant, Gray Hunter Stenn (Stenn).<sup>1</sup> Before the Court is a motion to dismiss for failure to state a claim upon which relief may be granted filed by Stenn. The Court construes the motion to dismiss as a motion for summary judgment because matters outside the pleadings were presented to and not excluded by the Court. Fed. R. Bankr. P.

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<sup>1</sup>The debtors claimed the monies as exempt property in their bankruptcy schedules. The Chapter 7 trustee abandoned all scheduled property of the estate prior to the debtors' filing of this adversary proceeding.

7012(b); Fed. R. Civ. P. 12(b).<sup>2</sup>

In their complaint, the debtors do not state the sections of the Bankruptcy Code under which they seek relief. Stenn, as reflected in its motion to dismiss and its brief in support of the motion, interprets the pleading as one to avoid a preferential transfer under § 547 of the Bankruptcy Code, 11 U.S.C. § 547 (1992). The debtors, however, have not specifically alleged the elements of a preference action in their complaint. Upon review of the record, the Court construes the debtors' pleading as a complaint for turnover of property pursuant to § 542(a) of the Bankruptcy Code, 11 U.S.C. § 542(a) (1992), and, in the alternative, a complaint to avoid a preferential transfer pursuant to § 547.<sup>3</sup>

The relevant facts giving rise to this adversary proceeding are largely undisputed. On July 23, 1991, Stenn obtained a default judgment in the amount of \$1,829.40 against C&R Manufacturing and Construction, Inc. (C&R) in a state court suit filed in Franklin

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<sup>2</sup>Pursuant to Rule 7012 of the Federal Rules of Bankruptcy Procedure, which incorporates Rule 12 of the Federal Rules of Civil Procedure, the parties were given reasonable opportunity to present additional material pertinent to the matters before the Court.

<sup>3</sup>The Court questions the debtors' standing to bring the instant action under § 542 inasmuch as the debtors are not authorized by § 542 or §§ 522(h),(i) of the Bankruptcy Code, 11 U.S.C. §§ 522(h),(i), to bring such an action. Because the debtors' action fails on the merits under both § 542 and § 547, however, the Court need not address the standing issue.

County, Illinois. The judgment was recorded in Williamson County, Illinois, on July 31, 1991. In order to execute on its judgment, Stenn sought to levy against certain property of C&R. This property was ultimately scheduled for a sheriff's sale in Williamson County on October 18, 1991. Prior to the sale, William Banks, as authorized agent for C&R, filed a motion to vacate the Franklin County default judgment.

On October 15, 1991, the attorney for C&R, John Drew, and the attorney for Stenn, Michelle Vieira, orally agreed that William Banks would bring a cashier's check for \$2,125.28 to Vieira's law office by October 17, 1991, the day before the scheduled sheriff's sale, and Stenn would then, in return, cancel the sale. The monies were delivered pursuant to the parties' agreement and the sale was canceled. On October 18, 1991, in Williamson County, Stenn moved for dismissal of its action against C&R on the basis that it had received full payment and satisfaction of its claim, and the motion was granted on October 21, 1991.

The debtors filed a joint petition on December 2, 1991, seeking relief under Chapter 7 of the Bankruptcy Code. Debtor William Banks stated on his bankruptcy petition that he was the president of C&R. On February 3, 1992, C&R filed a separate corporate petition seeking relief under Chapter 7 of the Bankruptcy Code.

Around this same time, a hearing was held in Franklin County on

the motion by C&R to vacate the default judgment. The motion was denied and Stenn then filed a satisfaction of judgment in Franklin County on February 7, 1992. Pursuant to this satisfaction of judgment, the Franklin County court dismissed the cause of action against C&R.

The debtors demand turnover of the \$2,125.28 paid to Stenn the day before the sheriff's sale. Under § 542, an entity in possession of property that a debtor may exempt under § 522 of the Bankruptcy Code, 11 U.S.C. § 522 (1992), must turnover said property.<sup>4</sup> Section 522 allows a debtor to exempt certain property from property of the estate. Property of the estate consists of all the debtor's legal or equitable interests in property as of the commencement of the bankruptcy case. 11 U.S.C. § 541(a)(1) (1992).

The debtors allege that the money was a security deposit to be held by Stenn to forestall the sheriff's sale pending the outcome of the motion by C&R to vacate the state court default judgment. According to the debtors, the money was never transferred as a payment to Stenn for the default judgment and never became the property of

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<sup>4</sup>Section 542 provides:

[A]n entity . . . in possession, custody, or control, during the case, of property . . . that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

11 U.S.C. § 542(a) (1992).

Stenn because Stenn was simply to hold the money as a security deposit. It is also the debtors' contention that they borrowed the money as individuals and loaned it to C&R and that C&R provided the money as a security deposit to Stenn. Thus, the money was originally the debtors' property, not the property of C&R. The debtors' apparent conclusion is that the money was property of their estate which they were entitled to exempt and the money is, therefore, subject to turnover pursuant to § 542.

Stenn contends the money was not paid as a security deposit. Stenn asserts that its agreement with C&R was that the sale would be canceled only if C&R paid, prior to the day of the sale, the money owed pursuant to the default judgment. Based on this argument by Stenn, it follows that if the money was transferred on October 17, 1991, in exchange for the cancellation of the sheriff's sale and in satisfaction of the judgment, the money rightfully became the property of Stenn and was not property of the debtors' estate at the time the debtors filed bankruptcy on December 2, 1991. As a result, the monies are not subject to turnover under § 542.

Regarding the merits of the debtors' complaint under § 547, Stenn points out that pursuant to § 547 the trustee or the debtor "may avoid any transfer of an interest of the debtor in property" only if, in addition to several other requirements, the transfer was made "for or on account of an antecedent debt owed by the debtor before such

transfer was made." 11 U.S.C. § 547(b)(2) (1992) (emphasis added); see 11 U.S.C. § 522(h), (i) (1992). Stenn asserts that the payment of the money to it was not on account of an antecedent debt of the debtors, but rather on account of an antecedent debt of C&R. Therefore, Stenn argues that the debtors cannot avoid the transfer of the \$2,125.28 pursuant to § 547. The debtors never addressed this contention.

A motion for summary judgment must be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civil P. 56(c); Fed. R. Bankr. P. 7056. When a motion for summary judgment is made, the "adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); Fed. R. Bankr. P. 7056. Summary judgment may be entered against the adverse party if the adverse party does not so respond. Id.

Stenn attached to its motion and its brief copies of numerous documents supporting its position and its version of the facts,<sup>5</sup>

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<sup>5</sup>All of these documents substantiate the facts set forth earlier in this opinion. Although the debtors' attorney disputed some of these facts at the hearing (e.g., the date of the sheriff's sale), the debtors provided no evidence, other than the evidence discussed herein, contradicting the documents filed by Stenn. Likewise, the

including an affidavit by Lisa Troester who states that she was present on October 15, 1991, when attorney Drew and attorney Vieira spoke about the sheriff's sale scheduled for October 18, 1991. Troester states that the attorneys orally agreed that "Cliff Banks, president of C&R," would bring a cashier's check for \$2,125.28 "representing payment in full of the judgment," to attorney Vieira's law office by October 17, 1991, "and in return the [s]heriff's [s]ale would be canceled." Troester asserts that there was "never any discussion between John Drew and Michelle Vieira regarding the funds being a security deposit. According to Stenn's brief, Troester is attorney Vieira's secretary.

The debtors have not filed any supporting documentation for their position, except three items attached to their complaint, and a copy of a financial note and a check handed to the Court at the hearing on the motion.<sup>6</sup> One of the items attached to the complaint was a copy of a January 6, 1992, letter by attorney Drew to attorney Vieira in which Drew indicates that the parties' agreement was that the money was to be held as a security deposit pending the outcome of the case. The only other relevant document attached to the complaint was a copy of the

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debtors did not object to these documents.

<sup>6</sup>At the hearing, this Court indicated it would take the motion under advisement pending the submission of briefs by both parties. Stenn filed a brief on May 1, 1992. The debtors have failed to file their brief which was due on or before May 11, 1992. The debtors have never filed any written response to the motion, although the debtors' attorney appeared at the hearing and argued against the motion.

debtors' Schedule C filed on December 2, 1991, which reflects that they claimed a "[s]ecurity [d]eposit" in the amount of \$2,100.00 with Vieira's law firm as exempt property.<sup>7</sup> The debtors have not filed any affidavits supporting their arguments.

This Court finds that the documents submitted by the debtors, even if admissible, are insufficient, absent a supporting affidavit, to raise a genuine issue of material fact. As to the merits of debtors' complaint under § 542, the only relevant issue raised was whether the money was a security deposit. The affidavit of Troester supports Stenn's contention that the money was not a security deposit. Troester, who was present when the attorneys reached their agreement, specifically states that this was not part of the agreement and that the money represented payment in full of the judgment in exchange for cancellation of the sheriff's sale. Moreover, Stenn's action of filing a satisfaction of judgment in both Franklin and Williamson counties is consistent with its argument that the payment was not a security deposit, but rather payment in full of the judgment. In addition, both satisfactions of judgment were filed promptly,<sup>8</sup> thereby supporting

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<sup>7</sup>The third item attached to the complaint was a copy of the satisfaction of judgment filed by Stenn in Franklin County on February 7, 1992 as well as the order by the Franklin County court dismissing the case on the same date. This item is uncontroverted and irrelevant to the issues at hand.

<sup>8</sup>In Williamson County, the satisfaction of judgment was filed October 18, 1991, the day after payment was made, and the case was dismissed on October 21, 1991. In Franklin County, the satisfaction

Stenn's argument.

The debtors presented only two pieces of evidence which might be said to refute Stenn's position. One is a letter debtors' attorney sent to attorney Vieira almost three months after the money was paid to Stenn, and over one month after the debtors filed bankruptcy, in which the debtors' attorney characterized the payment as a security deposit. The second piece of evidence was a copy of debtors' Schedule C, filed approximately two months after the payment was made, in which the payment is described as a security deposit. Neither of these documents carries any weight because the description of the payment as a security deposit is merely a conclusory statement, unsupported by any specific facts, made by the debtors' attorney. Moreover, the letter and the schedule were not written during the time the agreement or the payment took place and, therefore, both items lack reliability. Of significance is the debtors' failure to submit an affidavit countering the factual allegations set forth in Troester's affidavit. Finally, the debtors provided no evidence whatsoever to counter Stenn's argument that their cause of action does not fulfill all the requirements under § 547.

For these reasons, the Court finds, pursuant the Rule 56 of the Federal Rules of Civil Procedure, that the debtors' evidence is

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of judgment was filed February 7, 1992, soon after the motion to vacate the default judgment was denied, and the suit was dismissed the same date.

insufficient to raise a genuine issue of material fact precluding summary judgment. The Court finds that when the money was paid to Stenn on October 17, 1991, it became the property of Stenn and thus was not property of the debtors when the debtors filed bankruptcy on December 2, 1991. Therefore, the money is not subject to turnover under § 542. In addition, the Court holds that the transfer of the money may not be avoided by the debtors pursuant to § 547 because the money was not paid on account of an antecedent debt of the debtors as required by § 547, but rather on account of an antecedent debt of C&R.

The Court need not determine whether the money was property of the debtors prior to the time the money was paid to Stenn.<sup>9</sup> Even assuming the money was the property of the debtors prior to the transfer, it was not property of the debtors after the exchange and thus not property of the debtors' estate when the debtors filed bankruptcy. Consequently, the money was not subject to turnover under §542. Similarly, even if the money was property of the debtors prior to its transfer to Stenn, the debtors cannot avoid the transfer under § 547 because the money was not paid on account of an antecedent debt of the debtors.

For these reasons, the motion to dismiss by Gray Hunter Stenn, which the Court construes as a motion for summary judgment, is granted.

See written order entered this date.

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<sup>9</sup>Thus, the copy of the note and check, which were submitted by the debtors and relate to this issue, are irrelevant.

/s/ Kenneth J. Meyers  
U.S. BANKRUPTCY JUDGE

ENTERED: June 25, 1992