

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

IN RE:)
)
CHARLES BREWER and) Bankruptcy Case No. 02-32068
PATRICIA BREWER,)
)
Debtors.)

OPINION

This matter having come before the Court on a Motion for Relief from Automatic Stay filed by GCS Federal Credit Union, f/k/a Granite City Steel and Community Federal Credit Union, and Debtors' Objection to Motion for Relief from Automatic Stay; the Court, having heard arguments of counsel and being otherwise fully advised in the premises, makes the following findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

FINDINGS OF FACT

The material facts in this matter are not in dispute, and are stipulated by the parties as follows:

1. GCS Federal Credit Union ("Credit Union") is a federally chartered credit union.
2. Charles and Patricia Brewer ("Debtors") are individuals and are the debtors in the Chapter 13 case in which this proceeding is filed.
3. James McRoberts ("Trustee") is the trustee in the Chapter 13 case in which this proceeding is filed.
4. The Credit Union is the holder of a certain Loan and Security Agreement ("Loan") executed and delivered by Debtors as of November 16, 2001, in consideration of credit by the Credit Union to Debtors, wherein Debtors promised to pay to the Credit Union monthly payments with interest thereon at a rate of 12.15% per annum.
5. The Credit Union is the holder of a VISA Agreement ("VISA") executed and delivered by Debtor, Charles Brewer, as of July 8, 1998, in consideration of credit by the Credit Union to

Debtors, wherein Debtor, Charles Brewer, promised to pay to the Credit Union monthly payments with interest.

6. The Loans are secured by a security interest in favor of the Credit Union in Debtors' 1999 Mercury Grand Marquis bearing serial number 2MEFM74W7XX681581 and the Debtors' accounts at the Credit Union ("Collateral").

7. The Credit Union's security interest in the Collateral was properly perfected.

8. On June 3, 2002, Debtors filed for relief under Chapter 13 of Title 11 of the United States Code.

9. As of June 3, 2002, Debtors were indebted to the Credit Union pursuant to the Loans in the amount of \$15,049.90, consisting of \$14,070.74 for the Loan and \$979.16 for the VISA.

10. As of June 3, 2002, the Credit Union was indebted to Debtors, pursuant to a demand deposit account numbered 422250-0, in the amount of \$1,115.64.

11. The Debtors established a direct deposit to their account at the Credit Union for their benefit with respect to the deposit of retirement benefits including social security payments.

12. The Debtors authorized automatic withdrawal from their Credit Union account to pay their loans.

13. The Debtors also remained free at all times to close their accounts or change their direct deposit instructions.

14. Debtors have claimed the Credit Union account balance is exempt under 735 ILCS 5/12-1001(b), which provides that a debtor's equity interest, not to exceed Two Thousand Dollars (\$2,000) in value in any other property, is exempt from judgment, attachment, or distress for rent.

15. Debtors have also claimed that their Credit Union account balance is exempt from judgment, attachment, or other legal process as a result of 42 U.S.C. § 407(a), involving Social Security benefits which states:

The right of any person to any future payment, under this subchapter shall not be transferrable or assignable, at law or in equity, and none of the monies paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment,

garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

16. A hearing was held on August 12, 2002, on the Motion for Relief from Automatic Stay and the Debtors' Objection to Motion for Relief from Automatic Stay. At that time, the parties stipulated to the facts listed above and presented argument before the Court. The matter was taken under advisement.

CONCLUSIONS OF LAW

In its Motion for Relief from Automatic Stay, the Credit Union seeks relief from the stay to exercise a set-off of the funds in the Debtors' Credit Union checking account, pursuant to 11 U.S.C. § 543, against the prepetition debt owed on the vehicle and VISA debt. The Debtors object to the relief from stay and the set-off, claiming that the funds are exempt pursuant to the provisions of 735 ILCS 5/12-1006. In the alternative, Debtors claim that the funds are not reachable as a result of the anti-alienation provisions of the Social Security Act found at 42 U.S.C. § 407(a).

In analyzing the objections raised by the Debtors, the Court first addresses the Debtors' argument that the checking account funds at issue are exempt under the Wild Card Exemption found at 735 ILCS 5/12-1001(b). Under 11 U.S.C. § 522(c) of the Bankruptcy Code, it is provided that property that is exempt is not liable for prepetition debts. However, § 522 further provides that exempt property is subject to certain prepetition debts, including a debt secured by a lien that is not avoided under sub-section (f) or (g) of § 522. In the instant case, although the Debtors claim the property is exempt, that exemption does not affect the lien rights of the Credit Union, which were properly perfected against the funds in the Debtors' checking account. *See: In re Eggemeyer*, 75 B.R. 20 (Bankr. S.D. Ill. 1987); and *In re Weigand*, 199 B.R. 639 (Bankr. W.D. Mich. 1996).

Having found that the Debtors' exemption argument fails as a result of the provisions of 11 U.S.C. § 522, the Court turns to the Debtors' argument that the funds in their checking account are not reachable by the Credit Union as a result of § 407(a) of the Social Security Act codified at 42 U.S.C. § 407(a). As stated above, § 407(a), involving Social Security benefits, states, in pertinent part, that:

The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

The Debtors argue that this provision operates as a bar to the Credit Union's claimed right of set-off under 11 U.S.C. § 553, in that the set-off is a practice which constitutes a type of "other legal process" within the meaning of § 407(a). As authority for this argument, Debtors' cite the case of *Lopez v. Washington Mutual Bank*, 284 F.3d 990 (9th Cir. 2002), and *Tom v. First American Credit Union*, 151 F.3d 1289 (10th Cir. 1998).

A review of the authorities cited by the Debtors in support of their objection reveals that the *Lopez* decision, found at 284 F.3d 990, was recently withdrawn by the Ninth Circuit and replaced by an opposite decision on August 6, 2002, found at ____ F.3d ____, 2002 W.L. 1792494 (9th Cir. 2002). In this amended opinion, the Ninth Circuit reversed its initial decision and held that a customer's account balances were not exempt under the Social Security Act. In this amended opinion, the Ninth Circuit stressed that the plaintiffs in that case had voluntarily opened their accounts, made arrangements to have their benefits deposited in the accounts, and incurred overdrafts in those accounts; and that funds in the accounts were subsequently used to pay those overdrafts. The Court focused on the fact that the plaintiffs in the *Lopez* case had voluntarily agreed with the bank to allow set-offs to pay overdrafts. The Ninth Circuit recognized, in its amended opinion, that the ruling was contrary to a ruling by the Tenth Circuit in *Tom v. First American Credit Union*, found at 151 F.3d 1289. The Ninth Circuit justified this contradiction by distinguishing the facts in *Lopez* from those in *Tom*.

In considering the facts in the case at bar as compared to the facts in the *Lopez* case and in the *Tom* case, this Court concludes that the facts in the instant case more closely resemble the facts in the *Tom* case. For that reason, this Court finds that the ruling by the Tenth Circuit in *Tom* that a Credit Union could not use the self-help remedy of set-off and apply Social Security benefits contained in a checking account to satisfy a depositor's loan obligation is the correct decision in the instant case. This Court finds the Tenth Circuit reasoning in *Tom* to be persuasive in that it is apparent that the Ninth

Circuit, in its amended opinion in *Lopez*, completely ignores the clear and plain language of 42 U.S.C. § 407(a), regarding the prohibition of assignment of Social Security benefits. The Ninth Circuit, in *Lopez* as amended, appears to have its foundation in the voluntary agreement of the account holders to pay overdrafts from funds in their account, regardless of the character of those funds. This Court finds that a reading of the plain language of 42 U.S.C. § 407(a) leads to the conclusion that an individual cannot enter into an agreement which, in effect, assigns the individuals rights to any future payment of Social Security benefits. The Supreme Court stated, in *Philpott vs. Essex County Welfare Board*, 409 U.S. 413, 93 S.Ct. 590 (1973), that, when it passed § 407 of the Social Security Act, Congress “imposed a broad bar against the use of any legal process to reach all Social Security benefits.” The Supreme Court further affirmed that Social Security benefits, even when converted to “funds on deposit that are readily withdrawable retain the quality of monies within the purview of § 407.” *Id.* at 416.

In the case presently before the Court, there is no dispute that the funds which the Credit Union seeks to offset against prepetition debt of the Debtors are directly traceable to the Social Security benefits of the Debtors. This being the case, the Court concludes that 42 U.S.C. § 407(a) prohibits the action contemplated by the Credit Union regardless of the prior agreement of the Debtors that the subject funds would act as collateral for their loans from the Credit Union. The Court, therefore, concludes that the Motion for Relief from Automatic Stay must be denied in its entirety, and that the funds subject to the Motion must be released for use by the Debtors at the earliest possible moment.

ENTERED: August 15, 2002.

/s/ Gerald D. Fines
United States Bankruptcy Judge