

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

EARL INGRAM, aka/dba) In Proceedings
Earl's Club 37, Log Cabin,) Under Chapter 7
and VELMA LEE INGRAM, aka/dba) No. BK 89-40050
Lego's, Kajo's,))
) Debtor(s).)
))
CHARLES W. BOYT, JR.))
) Plaintiff(s),)
vs.))
))
EARL INGRAM and))
VELMA LEE INGRAM,))
))
) Defendant(s).)

MEMORANDUM AND ORDER

The facts of this case are not in dispute. On December 5, 1988, Charles W. Boyt ("Plaintiff") obtained a judgment against Earl Ingram ("Debtor") in the amount of \$4,847.48. Subsequently, on December 12, 1988, plaintiff filed an affidavit for non-wage garnishment in the Circuit Court of Williamson County, Illinois. The affidavit for non-wage garnishment was served on the Bank of Marion ("Bank") as garnishee. The bank answered that it was indebted to the debtor in the amount of \$1,970.68, representing \$1,939.46 in checking and \$31.22 in savings. The Circuit Court entered an order to pay over the funds on January 13, 1989. Four days later, before the funds had been paid over debtor filed for relief under chapter 7 of the Bankruptcy Code. Debtor claimed an exemption in the garnished funds, and the plaintiff objected.

The plaintiff argued that any interest the debtor had in the garnished funds terminated when the order to pay over was entered.

Therefore, such funds could not become property of the estate, or be subject to exemption. Debtor argued that since the funds had not been turned over at the time the chapter 7 petition was filed, a judicial lien existed on the funds which could be avoided under 11 U.S.C. 522(f)(1). This cause is before the Court on plaintiff's objection to exemption.

Commencement of a chapter 7 case creates an estate of all legal or equitable interests of the debtor in property. 11 U.S.C. 541(a)(1). Exemptions are taken from property of the estate. In re Nealis, 52 B.R. 329, at 331 (Bankr. N.D. Ill. 1985). Therefore, if the debtor had no legal or equitable interest in the property when the bankruptcy petition was filed, it cannot become property of the estate, or be subject to exemption.

However, if the property becomes property of the estate, the debtor may avoid the fixing of a judicial lien to the extent the lien impairs an exemption to which the debtor is entitled. In re Nealis, 52 B.R. at 331. A garnishment lien is a "judicial lien" subject to avoidance under 522(f)(1). In re Johnson, 53 B.R. 919, at 922, reh'g denied 57 B.R. 635 (Bankr. N.D. Ill. 1985). The issue presented for review is whether in a non-wage garnishment proceeding funds which have been ordered paid over, but are not paid over prior to the filing of a chapter 7 petition, belong to the creditor they were ordered paid to or remain the debtor's property subject to a voidable judicial lien. The issue is one of first impression under Illinois non-wage garnishment law.

Garnishment is a statutory proceeding unknown to the common

law. In order to determine the extent and scope of garnishment process it is necessary to resort to the statute which creates it. 20 Illinois Law and Practice, Garnishment 2 at 376 (1956). No provision of the Illinois Garnishment Act¹ deals directly with the issue before the Court. However, two provisions lend support to the notion that when the court enters an order to pay over, the garnishment lien terminates and the property belongs to the judicially designated party.

Section 12-707 "Duties of the Garnishee" provides:

12-707. Duties of garnishee. (a) To the extent of the amount due upon the judgment and costs, the garnishee shall hold, subject to the order of the court any non-exempt indebtedness or other non-exempt property in his or her possession, custody or control belonging to the judgment debtor or in which the judgment debtor has any interest. The Judgment or balance due thereon becomes a lien on the indebtedness and other Property held by the garnishee at the time of the service of garnishment summons and remains a lien thereon pending the garnishment proceeding.

Ill.Rev.Stat. ch. 110 12-707 (1984) (emphasis added). Simply stated, the clear meaning of the statute is that a lien arises on the indebtedness when the garnishment summons is served, and remains a lien pending the garnishment proceeding. Therefore, the lien exists only during the pendency of the proceeding. Webster's dictionary defines pending as "not yet decided." Webster's Ninth New Collegiate Dictionary 869 (9th ed. 1983). Once a court enters an order a decision has been made and the proceeding is no longer pending. This language supports the proposition that once the court enters its order that

¹Ill.Rev.Stat. ch. 110 12-701 et. seq.

funds be paid to a particular party, the lien terminates and the designated party owns the funds.

This reasoning is consistent with the purpose underlying garnishment, which is to make the assets of a judgment debtor available for satisfaction of adjudicated claims. 20 Illinois Law and Practice, Garnishment 2, at 377 (1956). A garnishment lien arises in favor of the plaintiff (creditor), during the pendency of the proceeding. 20 Illinois Law and Practice, Garnishment 52 at 416 (1956). Therefore, the lien arises to protect the creditor pending a decision by the court. Once the court has entered its order directing the funds be paid to the creditor, the creditor no longer needs the protection afforded by a lien.

The second relevant provision is section 12-715 which provides:

12-715. Refusal or neglect of garnishee to deliver property. If a Garnishee refuses or neglects to-deliver property in his or her possession when ordered by the court, the garnishee may be attached and punished for contempt; or the court may enter judgment against the garnishee for the value of the property or the amount due upon the judgment and costs, whichever is the lesser, and have same enforced against the garnishee.

Ill.Rev.Stat. ch. 110 12-715 (1984) (emphasis added). This provision is to compel the garnishee to comply with the court's order to pay over. The garnishee is a mere stakeholder during the garnishment proceeding and has a duty to hold the property subject to the entry of the garnishment judgment. In re Marriage of Souleles, 111 Ill. App. 3d 865, 444 N.E. 2d 721, at 725 (1982). Once

the court enters its order to pay over, the garnishee owes the property to the garnishing creditor and is liable for failure to pay over the funds. The court's order therefore has the effect of legally transferring the garnished property to the designated party.

The Illinois Wage Deduction Statute, Ill.Rev.Stat. ch. 110, 12-801 et. seq., provides for garnishment of wages, and is similar to the (non-wage) Garnishment Act. Under the Wage Deduction Statute the garnishment summons creates a lien on the debtor's wages, just as under the Garnishment Act the garnishment summons creates a lien on the non-wage property. Under both statutes the garnishment summons initiates the procedure whereby the creditor seeks to apply the debtor's property in satisfaction of an underlying judgment. In effect, both statutes freeze some type of the debtor's property to allow the debtor and creditor to litigate over who is entitled to it. Because of these similarities, cases under the wage deduction statute constitute persuasive authority in garnishment act cases.

It is settled under Illinois wage garnishment law that the debtor retains an interest in garnished wages until the court enters the wage deduction order. However, when the wage deduction order is entered the creditor has an unconditional right to the garnished wages. In re Johnson, 53 B.R. at 925. Both a wage deduction order and an order to pay over have the effect of judgments.² Since the debtor is divested

²A deduction order has been designated by statute to have the force and effect and be enforceable as a judgment. Ill.Rev.Stat. 110 12-802 (1984). An order to pay over by definition is a judgment defining judgment as a decision of a court upon the respective rights and claims of the parties. Black's Law Dictionary 755 (5th ed. 1979).

of his interest in garnished wages when the wage deduction order is entered, likewise the debtor should be divested of his interest in non-wage property when the order to pay over is entered.

The debtor argues that although the court had entered an order to pay over, since the funds had not been paid over, the funds remained the debtor's property subject to the judicial lien. To allow such an argument would give judicial orders effect when they were carried out, and not when they were entered. Such an argument is clearly wrong. A judgment at law becomes effective as soon as it is pronounced by the court. Commonwealth Loan Company v. Baker, 214 N.E. 2d 904, 67 Ill. App. 2d 359, aff'd. on other grounds, 240 N.E. 2d 682, 40 Ill. 2d 506 (1966). Therefore, the order to pay over must be given effect from the time it was entered. To give the order effect, the debtor must be divested of his interest and title must pass to plaintiff as of January 13, 1989. Since title passed to plaintiff on January 13, 1989, debtor retained no interest in the funds January 17, 1989, when the chapter 7 petition was filed. Thus, the funds did not become property of the estate, and debtor could not use the avoiding power of 522(f) to claim an exemption in the funds.

The debtor's second argument is that the fixing of the garnishment lien and subsequent transfer of funds subject to the lien constitutes an avoidable preference under 11 U.S.C. 547(b).³ The purpose of the preference provision is to facilitate the bankruptcy

³The Court notes that a proceeding to set aside a transfer as preferential is an adversary proceeding. However, the Court will address the issue since filing an adversary proceeding at this stage would be a needless waste of time and duplication of effort.

policy of equality of distribution among creditors of the debtor. This argument requires examination of sections 547(b) and 522(h) of the Bankruptcy Code.

Section 547(b) sets forth the elements of an avoidable preference:

- (1) "any transfer of an interest of the debtor in property";
- (2) "to or for the benefit of a creditor";
- (3) "for or on account of an antecedent debt owed by the debtor before such transfer was made";
- (4) "made while the debtor was insolvent";
- (5) "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 transfer was an insider"; and
- (6) "that enables such creditor to receive more than such creditor would receive if
 - (A) the case were a case under chapter 7 of this title;
 - (B) the transfer had not been made; and
 - (C) such creditor received payment of such debt to the extent provided by the provisions of this title."

As stated previously, the facts are not in dispute, and those facts establish all six elements of a preference. The fixing of the garnishment lien on the debtor's funds constituted a transfer; the transfer was to satisfy an antecedent debt; it was made within 90 days of the bankruptcy petition during which time the debtors were presumed insolvent, 11 U.S.C. 547(f); the transfer was made within 90 days of the filing of the petition; and the transfer enabled the creditor to receive more than he would have because the lien transformed the creditor's claim from unsecured to secured. Any judicial proceeding

that creates or fixes a lien upon the debtor's property will constitute a preference. 4 Collier on Bankruptcy 547.03, at 547-19 (15th ed. 1989).

The fact that the debtor rather than the trustee has raised the preference issue is of no concern. Under section 522(h) the debtor may avoid a transfer under section 547 if the trustee could have avoided the transfer but does not attempt to do so. However, the debtor's right to avoid the transfer is only to the extent that the debtor could have exempted the property if the trustee had avoided the transfer. 3 Collier on Bankruptcy 522.30, at 522-104 (15th ed. 1989). It is not in dispute that the debtors have room to exempt value of \$1,970.68 pursuant to Ill.Rev.Stat., ch. 110, 12-1001(b). Therefore, the debtors may avoid the transfer to the extent that they could have exempted the property if the trustee had avoided the transfer.

Based on the reasoning set forth above, IT IS ORDERED that the plaintiff's objection to exemption is sustained. IT IS FURTHER ORDERED that the transfer constitutes an avoidable preference and the sum of \$1,970.68 be paid to the bankruptcy estate.

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

ENTERED: July 24, 1989