

UNITED STATES BANKRUPTCY COURT  
For the Southern District of Iowa

In the Matter of

JESSE EARL HAYES, SR.,  
CHERYL DENICE HAYES,

Case No. 86-1591-C

Chapter 7

Debtor.

ORDER ON MOTION TO COMPEL TURNOVER OF ASSETS OF THE ESTATE

On May 6, 1987 a motion to compel turnover of assets of the estate filed on behalf of the debtor, Cheryl Denice Hayes, in the above-entitled case came on for hearing before this court in Des Moines, Iowa.<sup>1</sup> Dennis J. Kirkwood appeared on behalf of the debtor. Gary D. Pitts, a creditor, appeared on his own behalf. At the close of the hearing the matter was considered under advisement.

The debtors filed a joint petition for relief under Chapter 7 on May 30, 1986. Gary D. Pitts was listed as a creditor on the debtor's schedule A-3. Mr. Pitts holds a judgment against Cheryl D. Hayes arising out of a small claim action to collect rent and utilities. The debtor asserts that Mr. Pitts had a garnishment outstanding against the wages of Cheryl Hayes at Northwestern Bell Telephone Company on the date of filing bankruptcy. The debtor further states that wages were garnished after the date of filing bankruptcy and that Gary Pitts received \$387.00 from the state court clerk's office.

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<sup>1</sup> A proceeding to recover money or property of the estate is an adversary proceeding governed by Part VII of the Rules of Bankruptcy Procedure. See Fed. R. Bankr. P. 7001(1). Although the debtor has failed to properly file a complaint for turnover, the court in the interest of expediency heard the debtor's motion and agreed to consider the matter under advisement.

On July 31, 1986 the garnishment was quashed by the state court by virtue of notice of the debtors' bankruptcy case.

In the motion to compel turnover the debtor asserts that the wages garnished were claimed as exempt pursuant to Iowa Code 627.6(10). The debtor further asserts that the wages were earned and payable to her within 90 days prior to filing bankruptcy. Accordingly, the debtor relies on 11 U.S.C. section 522(h) to avoid a transfer of property that she argues could have been, but was not, avoided by the trustee pursuant to 11 U.S.C. § 547.

Section 522(h) allows a debtor to avoid a transfer of property to the extent that the debtor could have exempted such property if the transfer had been avoided by the trustee as preferential under section 547 and the trustee failed to do so. The debtor's rights under section 522(h) are derivative; they stem from the rights of the trustee with respect to exempt property which the trustee has failed to assert. In re Johnson, 53 B.R. 919, 921 (Bankr. N.D. Ill. 1985). When asserting the rights of the trustee to avoid preferential transfers under 11 U.S.C. section 547, the debtor's rights under section 522(h) cannot be greater than the rights of the trustee under section 547.

Section 547(b) allows the trustee to avoid any transfer of an interest of the debtor in property that is:

- (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 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.

Based on the standard to establish a preferential transfer under section 547(b), the trustee could not have avoided the transfer of funds to Mr. Pitts and therefore the debtor cannot do so under section 522(h). One of two exhibits received at the May 6, 1987 hearing is a district court clerk's office computer printout summation of the small claims judgment, the monies received pursuant to the garnishment from the debtor's employer and the monies paid over to the judgment creditor, Mr. Pitts. The exhibit reveals that all payments from the employer were received by the clerk of court by December 30, 1985 and all monies sufficient to satisfy the judgment were

disbursed to Mr. Pitts by February 14, 1986.<sup>2</sup> The debtor's petition was filed on May 30, 1986, more than 90 days after the last transfer to Mr. Pitts.

The debtor's assertion that Mr. Pitts received funds totalling \$387.00 from the clerk of court within 90 days or after the filing of the petition is unsupported by the evidence presented at the May 6, 1987 hearing. No testimony was offered to prove these alleged facts. Moreover, even if a payment of \$387.00 had been received within the preferential period, neither the trustee nor the debtor could avoid the transfer by virtue of the exception to the avoidability contained in 11 U.S.C. section 547(c)(7). Section 547(c)(7) provides that a trustee may not avoid a 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.

This language clearly expresses Congress's intent to relatively small transfers of the debtor's property before the filing of the petition to stand regardless of whether they have the effect of preferring one creditor over another. In re Johnson, 53 B.R. at 921.

It appears from an examination of the debtors' schedules that the debts are primarily consumer debts and that the property

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<sup>2</sup> Since the judgment has been satisfied and the garnishment has been quashed, there appears to be no lien to avoid and thus no remedy available under 11 U.S.C. section 522(f)(1). See In re Buzzell, 56 B.R. 197, 198 (Bankr. D. Md. 1986); In re Johnson, 53 B.R. 919, 922 (Bankr. N.D. Ill. 1985); In re Gibbs, 39 B.R. 214, 215 (Bankr. W.D. Ky. 1984).

affected is less than \$600. Thus, even if a transfer of funds had occurred within the preferential period, the debtor is barred from recovering the \$387.00 sought.

WHEREFORE, based on the foregoing analysis, it is hereby found that a preferential transfer as contemplated by 11 U.S.C. section 547 did not occur.

THEREFORE, the debtor's motion to compel turnover of assets of the estate is denied.

Signed and filed this 28th day of September, 1988

LEE M. JACKWIG

U.S. BANKRUPTCY JUDGE