UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of

AMERICAN SECURITIES AND LOAN, INC.,

Debtor.

Case No. 84-1230-W

Adv.Pro.No. 86-0148

ROBERT F. CRAIG, Trustee,

Plaintiff,

V.

DOUGLAS COUNTY BANK AND TRUST CO. A Nebraska Banking Organization,

Defendant.

ORDER ON MOTION FOR SUMMARY JUDGMENT

On March 12, 1987 a hearing on defendant's motion for summary judgment was held. P. Scott Dye appeared on behalf of defendant Douglas County Bank & Trust Company (Bank) and Frank M. Schepers, John D. Sens, and David D. Begley appeared on behalf of Robert F. Craig, the trustee. The adversary complaint filed by the trustee alleges the defendant (Bank) was the recipient of a voidable setoff and preferential transfer. In its motion, the Bank contends it is entitled to a judgment as a matter of law in that there are no factual disputes and that a release obtained from the receiver of the debtor operates as a complete defense to the trustee's claims. For the reasons discussed below, the Bank's motion is denied.

FACTUAL BACKGROUND

This case arises out of the failure of a state chartered industrial savings institution, American Securities and Loan, Inc. (ASL), of Council Bluffs, Iowa. On August 9, 1984, the Auditor of the State of Iowa (Auditor) closed ASL, citing insufficient capital and nonearning investments as reasons for the

closing.[1] On the day before, the Iowa District Court for Pottawattamie County had appointed the Auditor as receiver for purposes of liquidating ASL's affairs. On August 10, 1984, ASL filed for protection under Chapter 11. On that same date, ASL applied for a temporary restraining order and an order for turnover of assets to the debtor. After a hearing on the matters, former Bankruptcy Judge Richard Stageman ruled on August 16, 1984 that the best interests of the creditors would be served by a liquidation conducted by the Auditor under a state court receivership. ASL's application was denied and ASL's properties were ordered to remain in the hands of the Auditor as custodian. Shortly thereafter, the debtor moved for a new trial, a creditors committee requested reconsideration of the order and the receiver moved to dismiss. On September 24, 1984, these motions were denied.

On February 28, 1985, the auditor and Bank applied to Judge Stageman for approval of an agreement concerning the transfer of notes to the Bank in satisfaction of ASL's debt to the Bank. On June 1, 1984, the Bank had provided ASL a line of credit-in the amount of $170,000.00. In return, ASL executed a promissory note in favor of the Bank and pledged certain notes and the underlying collateral of the notes as security. At the time approval of the agreement was sought, approximately $204,000.00 was due to the Bank. This figure included the line of credit, overdrafts, and interest. The agreement called for the Bank to retain the pledged notes and.underlying collateral in lieu of the.debt. Al.so, the agreement had language that stated:

> Whereas, certain claims and disputes have arisen regarding these obligations and collateral, and regarding other transactions between Bank and American Securities, and the parties hereto desire to settle all disputes between them by this agreement.

The agreement required the receiver and the Bank to execute a release that contained boiler plate language releasing the Bank from:

> any and all causes of action, suits, ,accounts, contracts, claims, and demands whatsoever, in law or in equity, which said American Securities,

[1] The auditor is charged with licensing, supervising, and examining industrial loan companies. Iowa Code Chapter 536A.

> the estate of American Securities, and the undersigned, as receiver for American Securities now has, or has had at antyime -[sic] prior to the date thereof, against Bank, its officers, directors, employees, and agents on account of any claim, act, error, contract agreement, circumstance, matter, cause, or thing.

The auditor signed the release, and on February 28, 1985 Judge Stageman approved the agreement. This agreement and the court's approval thereof that are the focal points of the dispute between the Bank and the trustee.

On May 14, 1985 the creditors committee moved for the appointment of a trustee on the ground the debtor had failed to investigate a purported voidable transfer. Noting that the motion stood unopposed, Judge Stageman granted it on June 4, 1985. Robert F. Craig was appointed as trustee on December 30, 1985.

The trustee claims that another loan transaction between the Bank and ASL.-occurred or,' June 1,.1984' More specifically, the trustee asserts that, as of that date, ASL owed the Bank an unsecured debt of $883,106.72. The trustee further contends that ASL sold the Bank certain notes and the collateral securing such notes for $883,106.72 with the purchase price consisting of a credit on the $883,106.72 debt. The trustee argues the transfer of the notes and collateral fell within the 90-day preference period of section 547 and the 90-day voidable setoff period of section 553(b).

Simply stated, the Bank's main position is that setoff and preferential transfer claims are barred as a matter of law because of the agreement and Judge Stageman's sanctioning of it. The trustee asserts, among other things, that it was not the intent of the court, the receiver, or receiver's counsel to release preference and setoff claims. The Bank responds by contending that extrinsic evidence as to the intent of the parties is not controlling over the unambiguous language of the agreement and release.

DISCUSSION

A. Summary Judgement Standard

Bankruptcy Rule 7056 provides that Federal Rule of Civil Procedure 56 which governs summary judgment applies in bankruptcy adversary proceedings. The Eighth Circuit Court of Appeals has set forth the following standard:

> Summary judgment is appropriate only when the moving party satisfies its burden of showing the absence.of-a genuine issue as to any material fact and that it is entitled to judgment as a matter of law. In reviewing a motion for summary judgment, the court must view the facts in the light most favorable to the opposing party and must give that party the benefit of all reasonable inferences to be drawn from the facts. This Court often has noted that summary judgment is "an extreme and treacherous remedy," and should not be entered "unless the movant has established its right to a judgment with such clarity as to leave no room for controversy and unless the other party is not entitled to recover under any discernible circumstances."

Foster v. Johns-Manville Sales Corp., 787 F.2d 390, 391-92 (8th Cir. 1986) (citations omitted). Applying this standard to this case, the Bank's motion for summary judgment cannot be granted.

The parties expend much energy in arguing whether the parol evidence rule is applicable to this case. Consideration of the parol evidence rule is not necessary. Rather, the court directs its examination to the Code's treatment of receivers and trustees. Based on this examination, the court finds that the Bank is not entitled to prevail as a matter of law because the receiver had no power to void transfers and hence had no power to settle setoff and preferential transfer claims. It necessarily follows that Judge Stageman did not authorize the settlement of such claims when he signed the agreement on February 28, 1985.

The Code confers many powers upon a trustee. Among them is the power to pursue preferential transfers under section 547. Sectioti 547(b) specifically provides-that it is the trustee who "may avoid" a preferential transfer. Under section 1107(a), the debtor as debtor-in-possession has the powers of a trustee and thus has the ability to sue under section 547. There is no Code provision that grants a receiver such power.

There is a dearth of case law addressing whether a receiver can be cloaked with the powers of a trustee. In Matter of Property Management and Inv., Inc., 19 B.R. 202 (Bankr. M.D. Florida 1982), creditors urged the court to exercise its abstention powers and excuse a state court appointed receiver from the turnover provisions of section 543. Initially the court agreed with the creditors but upon reconsideration decided that abstention was improper. The court stated:

> [T]his court is now satisfied upon reconsideration that while the interest of certain parties may be adequately taken care of in the State Court Receivership, the State Court is not in the position to assure full and complete relief to all parties of interest, neither can it assure a fair and equitable distribution of the assets of [the debtor] inconformity with the scheme of distribution envisioned by the Bankruptcy Code. In addition, it is clear that the State Court Receiver is unable to assert the powers of avoidance reserved to the bankruptcy trustee under SS 544, 545, 547 and 548.

Id. at 206.

In discussing who may sue to recover preferential transfers, Collier addresses the issue of a receiver maintaining such -an action:

> Section 105 of the Code prohibits the bankruptcy judge from appointing a receiver in a case under title 11 under any circumstances. The Code has sufficient provision for the appointment of a trustee when needed. Section 701, for example, provides for the appointment of an interim trustee 'promptly after the order for relief...' Appointment of a receiver is now impossible and would circumvent the established procedures.

4 Collier on Bankruptcy, i 547.52[4] (15th ed. 1986), citing H.R. Rep. No. 595, 95th Cong., lst Sess. 316 (1977) and 11 U.S.C. section 105.

These authorities lead this court to conclude the receiver had no power to settle preference claims. Parenthetically, the court notes that Judge Stageman recognized this in entertaining a motion for a new trial concerning his earlier order of abstention and order denying application for turnover of assets. In that proceeding, the creditors committee and the debtor argued that if the assets in the possession of the receiver were not turned over, the preference claims would be lost. Judge Stageman responded:

> I don't think the preference will be lost. I haven't dismissed this case. You're still a debtor.
>
> ….

> You can be in a lawsuit any place you want. That's what I meant when I said I don't think the state (receiver] has a right to pursue any lawsuits. I turned assets over to them; and I suppose you might be included in that cause of action, but that wasn't in.my mind. I have no intention that there be a preferential transfer lost. I haven't dismissed this case.
>
> You're still a debtor, and your rights to collect those--pursue those preferential transfers and so forth are still yours.

Plaintiff's Ex. 5, pgs. 18 and 20.

CONCLUSION AND ORDER

WHEREFORE, based upon the discussion set forth above, it is hereby found that the Bank is not entitled to judgment as a matter of law.

THEREFORE, the Bank's motion for summary judgment is denied.

Signed and filed this 2nd day of October, 1987.

LEE M. JACKWIG

U.S. BANKRUPTCY JUDGE

Place in back of Decision #55 in decision book.

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF IOWA

WESTERN DIVISION

IN RE

AMERICAN SECURITIES AND LOAN, INC. Bankruptcy No. 84-1230-W

Debtor,

ROBERT F. CRAIG, Trustee,

Plaintiff-Appellee,
vs. CIVIL NO. 87-116-W

DOUGLAS COUNTY BANK AND TRUST COMPANY, a Nebraska Banking Corporation, ORDER

Defendant-Appellant.

Douglas County Bank and Trust appeals from a decision of the U. S. Bankruptcy Court for the Southern District of Iowa denying the Bank's motion for summary judgment against an attempt by the Trustee of the bankruptcy estate to collect allegedly voidable preferences from the Bank. Well before the Trustee was appointed, the Bank entered into a settlement agreement with a Receiver appointed by an Iowa court, and that settlement purported to release all claims of the debtor's estate against the Bank. Viewing that settlement as a release of any preference claim the Trustee may have against it, the Bank moved for summary judgment. The Bankruptcy Court denied the motion after concluding that the Receiver lacked the authority to release the

preference claim. For the following reasons, the court affirms the Bankruptcy Court's decision.

The debtor, American Securities and Loan, Inc. (AS&L), was an industrial thrift institution in Council Bluffs chartered by the state of Iowa, but ineligible for protection by the FDIC, FSLIC, or any other federal deposit insurance agency. In 1983 and 1984, after a major Nebraska "industrial" failed and took its depositors down with it, depositors with other industrials in the Omaha-Council Bluffs area began to abandon their industrials in favor of more secure institutions, and those industrials began to fail.

On August 9, 1984, the Iowa Auditor's office, which oversees Iowa industrial thrift institutions, took over AS&L pursuant to a state court receivership order. The next day AS&L filed for reorganization under Chapter 11 of the Bankruptcy Code in the U. S. Bankruptcy Court for the Southern District of Iowa, where the Honorable Richard Stageman then presided, and sought a temporary restraining order from Judge Stageman in order to restrain the Auditor as receiver from carrying out his intention to liquidate AS&L. Judge Stageman denied the motion and permitted the Auditor to remain in control of AS&L in the hope that a more orderly liquidation would result. At this point no bankruptcy trustee had been appointed; trustees are not appointed as of course in Chapter 11 proceedings unless the court so orders, see 11 U.S.C. 1104(a), and the Bankruptcy Court initially denied a request to appoint a trustee.

Douglas County Bank and Trust had extended credit to AS&L up to a few weeks before it failed. All parties agree that on June 1, 1984, the Bank extended a $170,000.00 line of credit to AS&L, and that this loan was secured by promissory notes owned by AS&L. Furthermore, the Trustee contends that AS&L sold the Bank certain notes and collateral securing such notes at the same time for $883,106.72 in exchange for a credit on an outstanding debt in that amount which AS&L previously owed to the Bank. Because these exchanges took place less than ninety days prior to AS&L's Chapter 11 filing, the Bankruptcy Court presumes that the assets of AS&L given in exchange for the credit were given while AS&L was insolvent, and these transactions therefore must be scrutinized as potential voidable preferences under section 546.

In early 1985 an agreement was reached between the Bank and the Iowa Auditor. The real and personal property retained by the Bank and the amounts of the debts of AS&L forgiven are not material to this appeal; what is important for present purposes is that the agreement expressed the desire of "the parties hereto to settle all disputes between them by this agreement," and required the Auditor and the Bank to execute a release which would release the Bank from "any and all causes of action, suits, accounts, contracts, claims and demands" which AS&L, the estate or the receiver "now has or has had" against the Bank and its officers. The Auditor signed a release, and on February 28, 1987, Judge Stageman approved the settlement.

On May 14, 1985, the committee of creditors asked the Bankruptcy Court to appoint a trustee because the debtor had

failed to investigate a purported voidable preference. This motion was not resisted, and on December 30, 1985, Robert Craig was appointed as Trustee. On June 25, 1986, Craig filed a motion to void the June 1984 transfer of property from AS&L to the Bank which accompanied the $883.106.72 credit, either as a voidable preference under section 547 or as a voidable setoff under section 553(b). The Bank, of course, argues that these preferences claims are among the causes of action of AS&L's estate which the Auditor released in the settlement agreement.

At this point it is worthwhile to recall what issues were not before the Bankruptcy Court. The court was only asked to resolve the effect of the settlement upon the preference claims; it has not yet been asked to decide whether the transfer is indeed voidable under the Bankruptcy Code provisions relied upon by the Trustee. Because the Bank chose to raise this issue on a motion for summary judgment, the precise question before that court and now before this court is whether the Bank satisfied its burden of showing the absence of any genuine issues of material fact and that it is entitled to judgment as a matter of law. See Bankruptcy Rule 7056; Fed. R. Civ. P. 56.

The Bankruptcy Court correctly viewed the critical issues as whether the Auditor, as Receiver, had the actual authority to release the Trustee's preference claim, and if not, whether Judge Stageman's subsequent approval of the settlement provided the necessary authority.

The first issue is difficult to resolve because Congress did not appear to have anticipated that a state court receiver and a

bankruptcy court trustee would preside in succession over the estate (or estates) of the same debtor, or that the trustee would attempt to sue on a claim which the receiver purportedly attempted to release. The trustee and receiver have one important feature in common--each owed a primary duty to act in the interests of the creditors of the estate. See In re Morning Treat Coffee Co., Inc., 77 Bankr. 62, 65 (Bankr. M.D.La. 1987); State ex rel. Havner v. Des Moines Union StockVards Co., 197 Iowa 987, 197 N.W. 1009, 1010 (Iowa 1924). However, it does not follow that the receiver is also an agent or representative of the creditors who is capable of releasing a right of the creditors, especially a right which he himself could not exercise, and which could only be exercised by the debtor in possession or a trustee. See In re Property Management and Investment, Inc., 19 Bankr. 202, 206 (Bankr. M.D.Fla. 1982).

If a preference claim were truly a piece of property of the bankruptcy estate, perhaps its release and the settlement could be viewed in the same manner as a receiver's ordinary efforts to sell off the assets of the estate. However, the power to void preferences "is not an asset of the estate at the time of the filing of the bankruptcy case but rather is an exercise by the trustee of a creditor's right on behalf of all creditors to achieve a distribution of assets perceived by Congress to be more equitable to all creditors and to avoid advantages to some creditors that were perceived by Congress as inequitable." In re Morning Tree Coffee, 77 Bankr. at 65. This court believes that

the Bankruptcy Court properly held that the Receiver was not authorized to release the Trustee's preference claims.

While the Bankruptcy court did not explain why Judge Stageman's approval of the settlement could not provide the missing authority for the release, that court obviously drew that conclusion, and this court believes it is the proper one. The key premises of the Bank's argument on this issue are that the Bankruptcy Court was authorized to release the preference claim, and implicitly exercised that authority by approving the settlement. This court questions the first premise. Because a preference claim is "a right of creditors" rather than a right of the court or of the bankruptcy estate, the court should have no better authority to release it, implicitly or explicitly, than the receiver would have. For this reason the court cannot construe Judge Stageman's approval of the settlement as an action authorizing the release of the preference claims of the Trustee.

The bottom line is, did Judge Stageman have the authority, and if he did, did he use it? The Bankruptcy Court did not find as a matter of law that the answer was "yes" to both questions. Neither can this court so find.

The court sympathizes with the Bank's situation. However, it cannot order the Bankruptcy Court to enforce a release which was not executed by the Trustee, the only party with authority to effectuate such a release. Accordingly,

IT IS HEREBY ORDERED that the decision of the Bankruptcy Court below is affirmed.

October 11, 1988.

Donald E. O'Brien, Judge
UNITED STATES DISTRICT COURT

O6/30/'89 U.S SENATOR HARKIN/CO. BLUFFS 001

Place behind Decision #55 in Decision Book.

United states Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 89-1413SI

In Re: American Securities
and Loan, Inc.,

Debtor,

Douglas County Bank & Trust,

Appellant,

vs.

Robert F. Craig, Trustee,

Appellee.

Appeal from the United States
District Court for the
Southern District of Iowa

JUDGMENT

The Court has carefully reviewed the original file of the District Court. On the Court's own motion, this appeal is hereby dismissed for lack of appellate jurisdiction.

June 28, 1989

Order Entered at the,Direction of the court:

Clerk, U.S. Court of Appeals, Eighth Circuit