

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

BKY 4-90-6274

FERRIS J. ALEXANDER,

Debtor.

THE BANKRUPTCY ESTATE OF FERRIS
J. ALEXANDER, JAMES E. RAMETTE,
TRUSTEE,

ADV 4-95-030

Plaintiff,

-v.-

PAINWEBBER INCORPORATED, THE
WILSON LAW OFFICE, MESHBESHER &
SPENCE LTD., AND CAROLYN J.
ALEXANDER,

MEMORANDUM ORDER GRANTING
PLAINTIFF'S MOTION FOR PARTIAL
SUMMARY JUDGMENT

Defendants.

At Minneapolis, Minnesota, April 21, 1995.

The above-entitled matter came on for hearing before the undersigned on the 9th day of March, 1995, on a motion by the plaintiff James Ramette ("Trustee") for an order granting partial summary judgment against the defendant The Wilson Law Firm ("Wilson"). Appearances were as follows: Matthew Burton for the Trustee; Gayle Gaumer for Wilson; Wendy Snyder for the defendant PaineWebber, Inc. ("PaineWebber"); and James Wellner for the defendant Meshbeshier & Spence ("Meshbeshier").

This matter is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(A), (E), (H), (K), and (O). Accordingly, I have authority to hear and determine this matter on a final basis.

UNDISPUTED FACTS

1. The defendant Carolyn J. Alexander ("Alexander") is the daughter of the debtor, Ferris Alexander ("Debtor"). James Ramette

NOTICE OF ENTRY AND FILING ORDER OR JUDGMENT	
Filed and Docket Entry made on	4/24/95
Patrick G. De Wane, Clerk, By	KK

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is the Trustee in Debtor's Chapter 7 bankruptcy case.

2. Alexander is the registered owner of PaineWebber Account L0-84498 ("Account"), which contains the following assets:

- a. 20 shares of Niagara Mohawk Power Corp. valued at \$14.25 per share (\$285);
- b. 199 shares of House of Fabrics valued at .93 per share (\$185.07);
- c. \$7,210.56 invested in money market; and
- d. 308 shares of Burlington Resources, Inc. valued at \$34.37 per share (\$10,585.96).

This property has an estimated value of \$18,266.59.

3. On October 23, 1990, the United States served a writ of execution¹ against the Account in proceedings to enforce a judgment against the Debtor, whom it believed to be the true owner of the Account as a result of various alleged fraudulent conveyances made by Debtor to his daughter. The record does not make clear whether the judgment was entered in state or federal court. There is no evidence in this record that the judgment which served as the basis for the writ determined that Alexander is not the owner of the Account. The record in this case, therefore, is that Alexander owns the Account.

4. Alexander objected to execution by the United States on the Account and sought to vacate the writ of execution. During the pendency of the proceedings regarding the competing claims, various

¹ For purposes of this decision, it is assumed that the United States levied on, but had yet sold, the Account. "The levy of an execution is the seizure by an officer of the debtor's property under the writ and the taking possession of it or subjecting it to his control." Horgan v. Lyons, 59 Minn. 217, 220 (1894). Pursuant to Minn. Stat. § 550.14, "[o]ther personal property shall be levied on by leaving a copy of the writ of execution and a notice specifying the property levied on, with the person holding it." Minn. Stat. § 550.135 (1994).

attorneys represented Alexander, including Meshbeshier and Wilson.

5. On February 8, 1994, Meshbeshier filed an attorneys' lien with PaineWebber on the Account in the amount of \$12,000.41.

6. By Order dated June 10, 1994, this Court entered judgment in favor of the Trustee and against Alexander in the amount of \$685,170.92 in connection with the Debtor's bankruptcy. See Ramette v. Carolyn J. Alexander et al., ADV No. 4-92-381. In that case, the Trustee had alleged and this Court found that Alexander was the recipient of fraudulent conveyances from Debtor.

7. On December 12, 1994, as part of the enforcement of the judgment, the Trustee served a Garnishment Summons ("Summons") on PaineWebber with respect to the Account. The Trustee served Wilson with notice of the Summons.

8. On December 21, 1994, Wilson served PaineWebber with a notice of an attorneys' lien on the Account in the amount of \$20,000. On December 23, 1994, Wilson recorded the attorneys' lien with the Minnesota Secretary of State.

9. On January 11, 1995, the United States released its writ of execution on the Account.

10. On January 20, 1994, the Trustee served PaineWebber with a writ of execution. PaineWebber refused to honor the execution as a result of the competing claims on the Account.

11. The Trustee then filed this adversary proceeding seeking an order of this Court authorizing the turnover of the property by PaineWebber, allowing the Trustee to liquidate the Account and apply the proceeds to the satisfaction of the Trustee's judgment,

and entering judgment against PaineWebber for the balance due to the Trustee.²

12. On March 1, 1995, the Trustee filed this motion for partial summary judgment as to the claimed interest of Wilson in the Account. Specifically, the Trustee seeks a determination that Wilson's attorneys' lien, even if valid and perfected, is subsequent in priority to the Trustee's garnishment lien and therefore ineffective because it is preceded by the two prior liens of Meshbeshier and the Trustee which consume its value. Wilson asserts that the Trustee's garnishment was ineffective.

DISCUSSION

A. Procedural Issue

The first issue is whether the Trustee's motion for partial summary judgment is properly before this Court. Wilson contends that it is not since the Trustee has not timely served Wilson with notice of the motion. In support of its argument, Wilson relies on Federal Rule of Bankruptcy Procedure 7069, incorporating Federal Rule of Civil Procedure 69. This Rule provides, in relevant part: "The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held" Fed. R. Civ. P.

² By Order dated April 12, 1995, PaineWebber was granted a garnishment discharge and was released from further liability with the respect to the Account. PaineWebber was further ordered to hold the account pending further order of this Court and not sell, liquidate, transfer or dispose of the Account assets until resolution of the competing claims and interests.

69(a). According to Wilson, this adversary proceeding is a "procedure supplementary to and in aid of a judgment," and therefore, Minnesota substantive and procedural law must be applied. Wilson goes on to argue that, because state law is applied, the Trustee must have complied with the state court rules requiring at least 28 days notice for summary judgment motions. See Minnesota General Rules of Practice for the District Courts, Rule 115.03.

Wilson's assertion that Rule 69 requires this Court to comply with the state court rules of motion practice is misplaced. Wilson fails to give meaning to the portion of Rule 69 which clarifies that only "the procedure on execution" shall be in accordance with the state laws. Rule 69 only governs the execution of judgments, and is simply inapplicable to this case.

Local Rule 1203 requires that moving papers on motions for summary judgment be delivered not later than 10 days before the hearing date. The Trustee has complied with this Rule, and the motion is properly before this Court.

B. Summary Judgment Standards

Summary judgment is governed by Federal Rule of Civil Procedure 56, made applicable to this adversary proceeding by Bankruptcy Rule 7056. Federal Rule 56 provides:

The judgment sought shall be rendered forthwith 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 judgment as a matter of law.

Fed. R. Civ. P. 56(c). The moving party on summary judgment bears

the initial burden of showing that there is an absence of evidence to support the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). If the moving party is the plaintiff, it carries the additional burden of presenting evidence that establishes all elements of the claim. United Mortgage Corp. v. Mathern (In re Mathern), 137 B.R. 311, 314 (Bankr. D. Minn. 1992), aff'd, 141 B.R. 667 (D. Minn. 1992). The burden then shifts to the non-moving party to produce evidence that would support a finding in its favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-52 (1986). This responsive evidence must be probative, and must "do more than simply show that there is some metaphysical doubt as to the material fact." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

C. Priority of Liens

The sole issue is whether the Trustee's garnishment lien is superior in time to Wilson's subsequently filed attorneys' lien.³ Wilson contends that the Trustee's lien does not have priority since the garnishment was not valid. Specifically, Wilson insists that, at the time the Trustee served the Summons, the Account was not property attachable by garnishment as the property was not "due absolutely" to Alexander. In response, the Trustee insists that the lien is in fact valid and has priority over Wilson's attorneys' lien because the Account was owned by Alexander and the debt from PaineWebber was unconditionally due to Alexander.

³ As reflected in the record of the March 9th hearing, the issue of whether Meshbeshor or Wilson have a properly perfected attorneys' lien is not before the Court.

Section 571.73 of the Minnesota Statutes addresses the type of property that is attachable by garnishment. All nonexempt property belonging to the garnishment debtor may be garnished. Minn. Stat. § 571.72, subd. 3 (1994). Subdivision 4 of this section, however, provides that the following property is not subject to attachment by garnishment:

any indebtedness, money, or other property due to the debtor, unless at the time of the garnishment summons the same is due absolutely or does not depend upon any contingency.

Minn. Stat. § 571.73, subd. 4(1) (1994) (emphasis added). If a garnishment summons is served when the garnishment debtor's claim to the property is contingent, the summons has no effect. Northwestern Nat'l Bank v. Delta Studios, Inc., 289 Minn. 202, 205, 184 N.W.2d 3, 4-5 (1971). If, however, the summons is properly served on attachable property under § 571.73, the creditor has a perfected lien. See Minn. Stat. § 571.81, subd. 1 (1994) ("From the time of service of a garnishment summons upon a garnishee . . . the creditor has a perfected lien" upon all attachable property). A lien perfected by garnishment is superior to other interests subsequently perfected. Id. at subd. 2.

In determining the existence of a contingency, "the question is whether or not there was any contingency upon which the garnishee's liability to the [garnishment debtor] depended." S.T. McKnight Co. v. Tomkinson, 209 Minn. 399, 401, 296 N.W. 569, 570 (1941) (quoting Lundstrom v. Hedge, 185 Minn. 40, 43, 239 N.W. 664, 665 (1941)). In other words, "the uncertainty (contingency) is one which so conditions the garnishee's obligation that in fact it may

never be due or owing to [the garnishment debtor]." Aratex Servs., Inc. v. Blue Horse, Inc., 497 N.W.2d 283, 285 (Minn. Ct. App. 1993). The contingency must be one that controls the obligation to pay and not simply the timing or form of payment. Rintala v. Shoemaker, 362 F. Supp. 1044, 1049 (D. Minn. 1973). No reported cases address whether, under Minnesota law, a writ of execution on property creates a contingency, thereby rendering property ungarnishable pursuant to subdivision 4.⁴

In order for the Trustee to satisfy his burden on summary judgment, he must establish all elements of his claim. Here, the Trustee needs to show that he served the Summons on PaineWebber prior to the filing of Wilson's attorneys' lien, and that at the time of the Summons, the Account was absolutely due to Alexander and no contingency existed. The Trustee has clearly established the first element: he filed the Summons on December 12, 1994 and the earliest Wilson could have perfected its lien was December 21, 1994. The Trustee has also shown that the Account was absolutely due to Alexander from PaineWebber on December 12, 1994. On that date, Alexander was the record owner of the Account and no one else had an ownership interest in the Account. Thus, PaineWebber, who admits it unconditionally owed the money to someone, was required

⁴ Many cases have held that certain property is not garnishable because the property was not due absolutely to the garnishment debtor or it depended upon a contingency. These cases, however, all involve situations where the garnishment debtor's ownership of the property subject to the summons had not been established. See, e.g., Rintala v. Shoemaker, 362 F. Supp. 1044 (D. Minn. 1973); Northwestern Nat'l Bank v. Delta Studios, Inc., 289 Minn. 202, 184 N.W.2d 3 (1971).

to pay out the Account to the record owner.

The fact that the United States had levied on the Account is irrelevant. A judgment debtor does not lose his or her rights in property once it is levied on except the right to possession and control. Banker v. Caldwell, 3 Minn. 46 (1859). During the period between the levy and the sale, the debtor is not divested of any ownership on the property. Id. In other words, the United States had no ownership interest, but instead had an execution lien on the Account. As a result, PaineWebber absolutely owed Alexander the Account, subject to the liens of the United States and Meshbesh. Accordingly the Trustee has met his burden on summary judgment.

The burden then shifts to Wilson to produce evidence that would support a finding in its favor. Wilson has failed to meet this burden. Wilson relies on the fact that the United States had served a writ of execution on the Account pursuant to a judgment entered in its favor and that the writ had not been removed on December 12, 1994.⁵ Yet, Wilson fails to submit the judgment into evidence. It is impossible to tell, from the record, whether the judgment was intended to transfer ownership of the Account to the United States. Absent evidence demonstrating that Alexander was

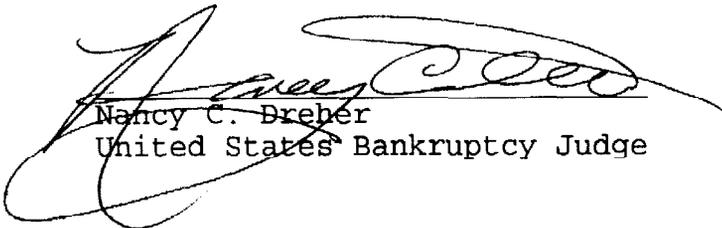
⁵ Wilson apparently believes that the writ of execution transfers ownership of the Account to the United States or, at the very least, creates an issue of ownership. That is simply not the case. Perhaps the confusion stems from the nature of liens possessed by the IRS, which is oftentimes afforded greater powers to enforce tax liens than ordinary secured creditors. Yet, even under the Internal Revenue Code, the IRS does not obtain ownership of property subject to a tax lien until after the seizure and sale of the property. See United States v. Whiting Pools, 462 U.S. 198, 209-11, 103 S. Ct. 2309, 2316-17 (1983).

not the true owner of the Account, the United States simply had an execution lien on the Account. The effect if this lien is no different than that of Meshbeshers' attorneys' lien. PaineWebber unconditionally owed the Account to Alexander, subject to the various liens, if valid.

In sum, the Trustee has met his burden of showing that Alexander was the owner of the Account, and therefore that PaineWebber absolutely owed Alexander proceeds of the Account. Wilson has failed to show otherwise. As a result, the Trustee served the Summons on property attachable by garnishment pursuant to § 571.73, and therefore has a perfected garnishment lien pursuant to § 571.81. Accordingly, the Trustee's garnishment lien is superior in time to Wilson's attorneys' lien.

CONCLUSION

ACCORDINGLY, IT IS HEREBY ORDERED THAT the Trustee's Motion for Partial Summary Judgment is GRANTED.


Nancy C. Dreher
United States Bankruptcy Judge