

Dated: June 28, 2004
The following is ORDERED:





Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re

PAUL ATCHLEY and TAMMY ATCHLEY,

Debtors.

Case No. 03-36128-L
Chapter 7

PAUL ATCHLEY and TAMMY ATCHLEY,
Plaintiffs,

v.

Adv. Proc. No. 03-01229

AMERICAN GENERAL FINANCE,
Defendant.

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT is the motion of the Plaintiffs, Paul Atchley and Tammy Atchley (“Debtors”), filed April 9, 2004, seeking summary judgment with respect to their complaint to avoid an alleged preferential transfer. The Defendant, American General Finance (“American General”) has responded that there is a factual dispute concerning whether the Debtors “have an allowable

exemption to avoid a transfer of pre-petition funds.” In support of their motion, the Debtors filed a memorandum and the affidavit of Paul Atchley. American General filed no affidavit. After careful review of the pleadings and affidavit filed in this case, together with the schedules filed in the underlying bankruptcy case, the Court is of the opinion that the motion should be granted. This is a core proceeding. 28 U.S.C. § 157(b)(2)(F).

FACTS

The Affidavit of Paul Atchley recites in pertinent part:

1. My name is Paul Atchley and I am the Debtor in the above-styled case;
2. In August 2003, American General Finance obtained a judgment against my wife and me in the amount of \$3,823.49 in the Shelby County General Sessions Court. The case number was 924869.
3. My wife and I own a joint checking account at AmSouth Bank, account number [omitted] in which our payroll checks are deposited;
4. On August 14, 2003, American General Finance executed on this checking account;
5. On September 1, 2003, AmSouth Bank removed \$2,000.00 from our checking account to satisfy this judgment;
6. My wife and I filed a Chapter 7 Bankruptcy on September 18, 2003 with John E. Dunlap, Esquire;
7. The garnished funds were reported on Schedule B and Schedule C of our petition; and
8. The Chapter 7 Trustee, Stephanie Cole, Esquire, has made no effort to recover the funds for the estate or object to our exemption.

The only factual issue raised by American General is whether the Debtors’ exemption is adequate. A review of Schedule C filed by the Debtors reveals that among the property they have

claimed as exempt are a number of items of personal property pursuant to Tennessee Code Annotated § 26-2-103. The value of these items exceeds \$4,000.00. Included among these is the AmSouth account with a stated value of \$895.00. This presumably was the value of the account on the day the bankruptcy petition was filed, without regard to the funds previously transferred to American General. No objection was filed by any party to the Debtors' claimed exemptions.

ANALYSIS

Federal Rule of Bankruptcy Procedure 7056 incorporates Federal Rule of Civil Procedure 56, which provides in pertinent part:

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. . . . The judgment 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(b) and (c). The Debtors, as movants, bear the burden of showing that no genuine issue of material fact remains in dispute. *Gregg v. Allen-Bradley Co.*, 801 F.2d 859, 861 (6th Cir. 1981). The facts, as well as any inferences that can be drawn from them, must be viewed in the light most favorable to American General as the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348 (1986).

The Bankruptcy Code permits certain payments made within the period immediately preceding the filing of a bankruptcy petition to be recovered for the benefit of the creditors of the estate. Section 547(b) provides:

Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property –

- (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.

The Affidavit of Paul Atchley demonstrates that each of the requirements of this section has been met. He states that there was a transfer of his property from his AmSouth Bank account to American General. He states that he was obligated to American General as the result of a judgment. Thus American General was a creditor. He states that the judgment was entered August 2003; that the account was garnished August 14, 2003; and that funds were removed from the account on September 1, 2003. The complaint recites that American General entered into a loan contract with the Debtors on December 1, 2001. Garnishment is a post-judgment remedy. American General has not contested that its debt preceded the execution by garnishment. Thus the transfer was made on account of an antecedent debt. Paul Atchley states that the bankruptcy petition was filed September 18, 2003, within 90 days after the transfer of funds from the AmSouth account. For purposes of section 547, the debtor is presumed to be insolvent on and during the 90 days immediately preceding the filing of the petition. 11 U.S.C. § 547(f). The transfer enabled American General to receive more than it would have received had the transfer not been made. American

General is listed as an unsecured creditor in the Debtors' bankruptcy schedules, and American General has not asserted that it holds any security for this obligation. The trustee filed a no asset report on December 15, 2003, meaning that no distribution to unsecured creditors was contemplated. Because American General received \$2,000.00 as the result of the transfer, it received more than similarly situated unsecured creditors will receive through the administration of the Chapter 7 case. The Debtors have made out a prima facie case for avoidance of the transfer to American General. When transfers are avoided pursuant to section 547(b), the property transferred may be recovered for the benefit of the estate from the initial transferee or the entity for whose benefit the transfer was made, or any mediate or immediate transferee of the initial transferee. *See* 11 U.S.C. § 550(a). American General was the entity for whose benefit the transfer from AmSouth was made and was the immediate transferee of the initial transferee, the General Sessions Court Clerk. The transfer may be recovered from American General.

American General does not contest any of the points concerning the avoidability of the transfer as a preferential transfer or its liability for the avoided transfer. Instead, American General asserts in its answer that the Debtors lack standing to bring the cause of action. Read in light of its answer, American General's response to the motion for summary judgment may be understood as an assertion that the Debtors' previously filed claim of exempted property is relevant to their standing to bring suit to avoid the preferential transfer. The complaint filed by the Debtors does indicate that they seek recovery of the funds for themselves on the basis of their claim of exemption in the AmSouth account.

To be sure, it is the trustee, not the debtor, who has the authority to avoid preferential transfers pursuant section 547(b). There is another section, however, that is applicable to this case. Section 522(h) permits a debtor to avoid certain transfers. That section provides:

The debtor may avoid a transfer of property of the debtor or recover a setoff to the extent that the debtor could have exempted such property under section (g)(1) of this section if the trustee had avoided such transfer, if –

(1) such transfer is avoidable by the trustee under section 544, 545, 547, 548, 549, or 724(a) of title [United States Code title 11] or recoverable by the trustee under section 553 of this title; and

(2) the trustee does not attempt to avoid such transfer.

The conditions for application of this section have been met. The transfer is avoidable under section 547 and the trustee has not attempted to avoid the transfer. The only remaining question is whether the Debtors could have exempted the property if the trustee had avoided the transfer.

Section 522(g)(1) provides:

Notwithstanding sections 550 and 551 of this title, the debtor may exempt under section (b) of this title property that the trustee recovers under section 510(c)(2), 542, 543, 550, 551, or 553 of this title, to the extent that the debtor could have exempted such property under subsection (b) of this section if such property had not been transferred, if –

(1)(A) such transfer was not a voluntary transfer of such property by the debtor; and

(B) the debtor did not conceal such property.

Neither of the conditions to this section apply. The transfer was an involuntary transfer pursuant to garnishment and the Debtors made no attempt to conceal the account. The remaining question is whether the account is property the Debtors could have exempted under section 522(b).

Pursuant to the authority provided by section 522(b)(1), the state of Tennessee opted out of the federal bankruptcy exemptions in favor of its own exemption laws. *See* TENN. CODE ANN. § 26-2-112. Tennessee Code Annotated § 26-2-103 provides an exemption from execution of up to \$4,000 of a debtor's equity interest in personal property. That section specifically includes within the personal property that a debtor may exempt money and funds on deposit with a bank or other

financial institution.

Because of the brevity of its response and the lack of supporting legal memorandum, it is difficult to tell whether American General simply overlooked the availability of sections 522(g) and (h), or whether it instead asserts that the section is not available to the Debtors because they have already listed in excess of \$4,000 of personal property as exempt in their Schedule C. American General may be saying that the Court must conduct a factual inquiry into whether the Debtors have not exhausted the exemptions available to them before their standing under section 522(h) is established.

If it is indeed the position of American General that section 522(h) requires a factual inquiry into a debtor's already claimed exemptions before standing is established, the Court rejects that interpretation. Section 522(i)(1) provides:

If the debtor avoids a transfer or recovers a setoff under subsection (f) or (h) of this section, the debtor may recover in the manner prescribed by law, and subject to the limitations of section 550 of this title [United States Code title 11] the same as if the trustee had avoided such transfer, and may exempt any property so recovered under section (b) of this section.

This section contemplates that claims of exemption not be made until property is actually recovered for the benefit of the estate. It is true that the Debtors have already claimed as exempt personal property of a value in excess of \$4,000. Amendments to schedules may be made at any time before a bankruptcy case is closed, however. *See* FED. R. BANK. P. 1009(a). In the event of an amendment to a debtor's claim of exemption, parties are given an additional 30-day period to file any objections. *See* FED. R. BANKR. P. 4003(b). Standing is established for purposes of section 522(h) and (i) where the property to be recovered is of a *type* that the debtor may exempt. It makes no difference whether the debtor *actually* succeeds in exempting the property once it is recovered for the benefit of the estate.

The Debtors are entitled to the entry of judgment against American General in the amount of \$2,000 together with prejudgment interest. *See, e.g., McLemore v. Montgomery (In re Montgomery)*, 136 B.R. 727, 735 (M.D. Tenn. 1992); *In re Southern Industrial Banking Corp.*, 87 B.R. 518, 520 (Bankr. E.D. Tenn. 1988); *In re H & S Transp. Co., Inc.*, 78 B.R. 519 (Bankr. M.D. Tenn. 1987). All funds recovered will be paid to the case trustee for appropriate administration. Upon recovery of funds, the Debtors shall promptly file any amendment to their Schedule C.

CONCLUSION

For the foregoing reasons, the Debtors' motion for summary judgment is **GRANTED**. Counsel for the Debtors shall prepare an appropriate judgment consistent with the decision of the Court.

cc: Debtors/Plaintiffs
Attorney for Debtors/Plaintiffs
Defendant
Attorney for Defendant