

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

FILED
U.S. BANKRUPTCY COURT
WESTERN DISTRICT OF N.C.

DEC 19 1995

In Re:

JAMES L. POTTER and
LINDA M. POTTER

Debtors.

J. BARON CROSHON

BY: DL
Deputy Clerk

Case No. 95-30376
Chapter 7

JUDGEMENT ENTERED ON DEC 19 1995

ORDER DENYING TRUSTEE'S MOTION FOR TURNOVER OF PROPERTY

This matter came before the court on the Trustee's Motion to Compel Debtors to Turnover to the Estate Non-exempt Property filed September 20, 1995. After review of the record, the evidence tendered by the parties, and the arguments of counsel, along with the applicable statutory and case law, the court finds that the Trustee's motion should be denied. The court makes the following Findings of Fact and Conclusions of Law:

1. The debtors filed a petition under Chapter 7 of the Bankruptcy Code on March 20, 1995.

2. In the Petition and Schedules, the debtors showed a First Charter bank account with a value of \$100.00. The debtors did not claim any exemption in the value of this account.

3. The Trustee learned that as of the date of the filing of the petition, there was \$2,594.00 in the First Charter account. After learning of this asset, the Trustee filed a motion with this court to order the turnover of those funds claiming the funds are property of the estate.

4. Prior to the date of filing of the petition, the debtor had written several checks against the account. According to the

evidence offered, the amount of checks payable from the account totalled more than the \$2,594.00 in the account. Thus, the debtor was in fact overdrawn on the date of the filing of bankruptcy.

5. There are no allegations of any wrongdoing on the debtor's part. It appears to the court that the checks written by the debtor were for payments in the ordinary course of business.

6. The court has concluded that, for the purpose of a trustee's §542 turnover action, the date of transfer of funds by check occurs at the time the check is delivered as long as honored by the bank within a reasonable time.

7. In preference actions (as contrasted to this turnover action), the Supreme Court has held that the date of transfer is the date of the bank's honoring of the check. Barnhill v. Johnson, 503 U.S. 393, 393 (1992). However, the Court restricted its holding in Barnhill to the facts of that particular case - an action under §547(b) of the Bankruptcy Code. In fact, the Court noted that every Court of Appeals that had considered a §547(c) action had held that the proper date of transfer is the date of delivery. The Court specifically declined to hold otherwise. Id. at 402 n. 9. Under Fourth Circuit precedent, the date of transfer is most often held to be the date of delivery. See, e.g., Durham v. Smith Metal and Iron Co. (In Re Continental Commodities, Inc.), 841 F.2d 527, 530 (4th Cir. 1988) (under §547(c)(2)(B), a transfer of funds by check is effective on date

of receipt); Quinn Wholesale, Inc. v. Northen, 873 F.2d 77, 78 (4th Cir.) (date of delivery rule for §549(a)(1) purposes) cert. denied, 439 U.S. 851 (1989); In Re National Enterprises, 174 B.R. 429, 432 (Bkrtcy. E.D. Va. 1994) (under §547(c)(4), transfer is effective on date of delivery).

8. The court also finds the precedent in §542 turnover actions persuasive. Under §542 of the Bankruptcy Code, any entity which has possession or control of property that the trustee may use must deliver the value of that property to the trustee. 11 U.S.C §542(a). However, under the Supreme Court ruling in Bank of Marin v. England, 385 U.S. 99 (1966), as codified and expanded in §542(c), a bank is not liable for paying a debtor's checks postpetition unless the bank knew of the bankruptcy. Section 542 provides, in part:

[A]n entity that has neither actual notice nor actual knowledge of the commencement of the case concerning the debtor may transfer property of the estate . . . in good faith . . . to an entity other than the trustee, with the same effect as to the entity making such transfer or payment as if the case under this title concerning the debtor had not been commenced.

11 U.S.C §542(c). Therefore, a debtor's bank is protected from liability if it, in good faith, pays the debtor's checks with property of the estate after commencement of the bankruptcy case. Section 542(c) protects only the good faith transferor of property of the estate; it does not protect the transferee. Section 549(a) will allow the trustee to avoid the postpetition transfer, but only as against the transferee - not the debtor or the transferor.

9. The court, after reviewing the precedent as set out above, concludes that the date of delivery should be used as the effective date of transfer of funds by check in a trustee's §542 turnover action. Thus, the court concludes that the Trustee's motion should be denied.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. The Trustee's Motion to Compel Debtors to Turnover to the Estate Non-exempt Property is hereby DENIED.

 Dated 12/15/95
George R. Hodges
United States Bankruptcy Court