

# In the United States Bankruptcy Court

## for the Northern District of Iowa

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ERLE E. RAYMER, JR.  
a/k/a Erle Raymer, Erle D. Raymer, Erle Raymer, Jr., Erle  
B. Raymer, Jr., and  
MARY L. RAYMER  
a/k/a Mary Raymer  
d/b/a Raymer Poultry, Erle Raymer Poultry, Raymer  
Poultry Farms  
*Debtors*

BANKRUPTCY NO. 87-01344-W

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Donna Lesyshen, Trustee  
*Plaintiff*

ADVERSARY NO. 87-0265W

vs.

RICHARD J. WITHAM  
a/k/a Dick Witham, and  
DICK WITHAM LEASING  
*Defendants.*

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### MEMORANDUM OF DECISION ON DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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The matter before the Court is the Motion for Partial Summary Judgment filed by the defendants September 28, 1987.

The Motion for Partial Summary Judgment was accompanied by a "Statement of Material Facts" not considered in dispute, and a "Memorandum of Authorities". The Motion was resisted by the plaintiff-trustee and that resistance was accompanied by a "Memorandum of Authorities".

Hearing on the Motion for Partial Summary Judgment was held November 18, 1987.

Having considered the briefs and other documents submitted by the parties as to the Motion, the Court makes the following entry:

I.

#### FINDINGS OF FACT

1. On September 5, 1984: Stephen Clow, d/b/a Strijoen Farms as vendor and Erle D. Raymer, Jr. and Mary L. Raymer, husband and wife, as vendees, entered into a real estate contract for deed which was recorded in the office of The Butler County Recorder on the same day. The property described in the contract was sold to the Raymers for a purchase price of \$110:000.00. The contract terms required monthly payments from Raymers to Clow in the amount of \$1,700.00 beginning January 1. 1985.

2. On September 9, 1984; Steven Clow and Avery Clow, husband and wife, assigned their rights under the real estate

[\(1\)](#)

contract with Raymers to Dick Witham, "for security purposes only".

3. On May 12, 1987, an agreement was executed between assignees Richard J. Witham a/k/a Dick Witham and Dick Witham Leasing, Inc. and vendees Erle D., Jr. and Mary L. Raymer.

4. The agreement executed May 12, 1987 included paragraph 1 entitled "Amendment" which stated as follows:

The parties agree, subject to the conditions later described in this agreement, to amend paragraph 1(B) of the original contract by changing the monthly installments from one thousand seven hundred dollars (\$1,700.00) each month to one thousand four hundred dollars (\$1,400.00) each month. The change in monthly installments shall be effective as of the 12th day of May, 1987. In all other respects paragraph 1(B) of the original contract shall remain the same and in full force and effect."

5. The "original contract" referred to was the real estate contract initially entered into between Clow and Raymers.

6. In the May 12, 1987 agreement, the Raymers acknowledged that they had not made required payments under the original contract since August of 1986. Paragraph 2 of the agreement further stated that "[i]n order that these delinquencies may be satisfied and future payments made timely, Buyers have entered into an assignment of certain pullet grower contracts to Seller, a copy of which is attached hereto, marked Exhibit "C"."

7. It was provided in the March 12, 1987 agreement that the first \$7,000.00 from each pullet growers' payment received shall be applied to the next five monthly installments of \$1,400.00 each. This application of funds refers to payments on the real estate contract.

8. On May 12, 1987, Erle D. Paymer, Jr. and Mary L. Raymer executed a document entitled "Assignment" by which the debtors assigned their rights in and to all of the pullet growing contracts to Witham.

9. The assignment of the pullet growing contracts contains the following language:

"This assignment is given as additional security for the assurance of the payment of a certain installment real estate contract between Strijoen Farms and Raymer dated September 5, 1984, and assigned September 5, 1984, to Dick Witham, and which contract is now amended. The consideration for this Assignment is the forbearance by Richard J. Witham from the filing of a Notice of Forfeiture for previous contract delinquencies and the amendment of the contract, however, it is clearly understood that this Assignment will not prevent the filing of a Notice of Forfeiture in the event that Raymers are in the future delinquent on said real estate contract, as amended."

10. On June 8, 1987, Erle E. Raymer, Jr. and Mary L. Raymer, husband and wife, filed their joint voluntary petition under Chapter 7 of the Bankruptcy Code.

11. Donna Lesyshen was appointed trustee.

12. In her capacity as trustee, Donna Lesyshen, has collected or is in a position to collect, approximately \$10,970 due to debtors from pullet growing contracts. No further pullet contract proceeds are anticipated. The \$10,970 is proceeds of the pullet growing contracts covered by the Assignment executed by Raymers on May 12, 1987.

13. On July 23, 1987, in her capacity as trustee, Donna Lesyshen filed a complaint seeking to avoid as preferential the transfer by the Raymers of their interest in the pullet growing contracts to the defendant, Dick Witham.

14. The defendants filed answer on August 21, 1987.

15. The answer admits the transfer but denies it is preferential.

16. On September 28, 1987, defendants Richard J. Witham a/k/a Dick Witham and Dick Witham Leasing (hereinafter Withams) filed their Motion for Partial Summary Judgment.

This is a core proceeding under 28 U.S.C. section 157(b)(2)(F).

## II.

### DISCUSSION

The crux of the defendants' motion is that debtors' assignment of the pullet growing contracts was made in part to secure postassignment payments of monthly installments under the real estate contract as modified, and therefore the assignment was not a transfer on account of antecedent debt. Defendants argue that plaintiff cannot satisfy 11 U.S.C. section 547(a)(2).

Defendants' desire, therefore, that seven thousand dollars (\$7,000) of the funds being held by the Trustee (five monthly payments following the assignment at fourteen hundred dollars (\$1,400) each) be paid to them. It is as to these funds the defendants seek partial summary Judgment.

The trustee, Donna-Lesyshen, resisted the Motion-for Partial Summary Judgment originally on the grounds "that there were genuine issues as to material fact and that therefore summary judgment was not appropriate. The trustee at the hearing on the Motion for Summary Judgment conceded that there were no issues of disputed fact but still resisted the Motion for Partial Summary Judgment on the ground that defendants were not entitled to the granting of such motion as a matter of law.

A motion for summary Judgment can be granted only if it is shown that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Barnes v. Reagan, 501 F.Supp. 215, (D.C. Iowa 1980). Bankr. R. 7056(c).

The court notes that no affidavits or discovery documents were filed with the motion or the resistance pursuant to Bankr. R. 7056(c). However, it is apparent to the court from the arguments of counsel, that none of the parties believes there is dispute as to a material factual issue.

The plaintiff-trustee argues that the assignment of the pullet growing contracts was a preferential transfer avoidable by her pursuant to 11 U.S.C. section 547(h).

Under that section; the trustee may avoid a transfer of property, in this case the assignment of the pullet growing contracts, if she can prove the transfer of an interest of the debtor in property which was:

1. to or for the benefit of defendants;
2. for or on account of an antecedent debt owed by the debtors before such transfer was made;
3. made while the debtor was insolvent;
4. made on or within ninety days before the date of the filing of the bankruptcy petition, and
5. that enables these creditors to receive more than they would receive in a Chapter 7 liquidation if the transfer had not been made. (11 U.S.C. section 547(b)(1)-(5) as it applies to these pleadings).

The defendants in their Motion for Partial Summary Judgment take the position that the assignment is not avoidable because it was not made on account of an antecedent debt owed by the debtors before the transfer was made.

The defendants say the assignment was in part for future or post-assignment monthly installments.

The court does not agree with defendants' characterization of the transaction.

The original uniform real estate contract from Clow to Raymers set the purchase price of the real property under paragraph 1 at \$110,000.00. Under paragraph 1(A) of the contract, there was a down payment of \$15,000.00. Under paragraph 1(B), the balance of the purchase price of \$95,000.00 was to be paid with interest at 14% per annum from September: 1985. Principal and interest payments under paragraph 1(B) of the contract were to be made beginning January 1, 1985 in the amount of \$1,700.00.

It was the \$1,700.00 monthly installment that was modified by the agreement of May 12, 1987. Under paragraph 1 of that amendment to the contract, the monthly installment was changed to **\$1:400.00**. The monthly installment change was made effective on the date of signing of the agreement, May 12, 1987, but no other aspects of paragraph 1(B) of the original contract were changed.

The court finds there was no change in the total purchase price.

Under the agreement executed May 12, 1987, the debtors acknowledged that they were delinquent and to cure these delinquencies and to provide for timely future payments they entered into an assignment of certain pullet grower contracts to Seller.

The agreement then provided that the first \$7,000.00 in proceeds from the pullet grower contracts were to be applied to the five monthly payments succeeding May 12, 1987.

Paragraph 4 of the agreement stated other consideration due to Withams as a result of Witham's forbearance from pursuing remedies as a result of default. That forbearance is more particularly described in the pullet grower contract assignment itself.

It is the language of that assignment that convinces this court that the assignment was given on account of antecedent debt owed by the debtors prior to the transfer and not for "new value".

That language is as follows:

"This assignment is given as additional security for the assurance of the payment of a certain installment real estate contract between Strijoen Farms and Raymer dated September 5, 1984, and assigned September 5, 1984, to Dick Witham, and which contract is now amended. The consideration for this assignment is the forbearance by Richard J. Witham from the filing of a Notice of Forfeiture for previous contract,, delinquencies and the amendment of the contract

Forbearance from pursuing remedies under the contract does not constitute "new value" within the meaning of 11 U.S.C. section 547(c)(1). In re White River Corp., 50 B.R. 403, 409 (Bankr. Colo. 1985).

A debt is incurred on the date upon which the debtor first becomes legally bound to pay. In re Iowa Premium Service Co., Inc., 695 F.2d 1109, 1111 (8th Cir. 1982).

The assignment was given to secure the obligations under the contract incurred September 5, 1984.

The assignment having been made on account of the prior debt it falls within the coverage of 11 U.S.C. section 547(c)(2).

The defendants are not entitled to partial summary judgment.

Judgment shall enter accordingly.

SO ORDERED ON THIS 17<sup>th</sup> DAY OF DECEMBER, 1987.

William L. Edmonds  
Bankruptcy Judge

File Stamped 12/17/87

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**In the United States Bankruptcy Court**

## for the Northern District of Iowa

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ERLE E. RAYMER, JR.  
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Donna Lesyshen, Trustee  
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ADVERSARY NO. 87-0265W

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### ORDER VACATING JUDGMENT AND ORDERING NEW JUDGMENT

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On the 21st day of December, 1987, it has come to the attention of the Court that the form of judgment entered in the Adversary Proceeding herein on December 17, 1987, was not executed by the Clerk or a Deputy Clerk.

The Court finds for the foregoing reason that the form of Judgment entered on December 17, 1987 should be vacated.

IT IS FURTHER ORDERED that a new form of "Judgment" executed by the Clerk or a Deputy Clerk shall be entered.

SO ORDERED ON THIS 17<sup>th</sup> DAY OF DECEMBER, 1987.

William L. Edmonds  
Bankruptcy Judge

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## **ORDER CORRECTING MEMORANDUM**

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There being a typographical error in the MEMORANDUM OF DECISION ON DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT entered by the undersigned and filed on December 17, 1987,

IT IS ORDERED that line one of page nine of the above- described Memorandum shall be corrected to read:

it falls within the coverage of 11 U.S.C. section 547(b)(2).

IT IS FURTHER ORDERED that Judgment shall stand entered as of December 17, 1987.

SO ORDERED ON THIS 17<sup>th</sup> DAY OF DECEMBER, 1987.

William L. Edmonds  
Bankruptcy Judge

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1. The parties do not argue that the nature of the assignment impacts upon the case. The court therefore finds that Witham had the authority to collect upon the contract and with Raymers to amend it.