

In the United States Bankruptcy Court

for the Northern District of Iowa

TERRY BERGENDAHL
d/b/a Terry's Repair
Debtor.

Bankruptcy No. L-87-02268S

Chapter 13

TERRY BERGENDAHL
Plaintiff

Adversary No. 87-0388S

vs.

OSCEOLA COUNTY CO-OP
Defendant.

MEMORANDUM OF DECISION

The matter before the Court is the debtor's complaint seeking a turnover of property which on the date of his bankruptcy filing was the subject of a levy under a state court Writ of Attachment obtained by defendant, Osceola County Co-op Oil Co. of Sibley, Iowa (CO-OP). Trial was held before the undersigned judge on December 7, 1987. The court issues the following ruling which shall constitute Findings of Fact and Conclusions of Law pursuant to B.R.P. 7052.

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

FINDINGS OF FACT

1. The debtor, Terry Bergendahl (BERGENDAHL), filed his individual voluntary petition under Chapter 13 of the Bankruptcy Code on November 4, 1987.
2. Carol F. Dunbar was appointed as case trustee.
3. Bergendahl and Co-op entered into a "Lease Agreement" covering real property located in Harris, Iowa for the period August 1, 1986 to July 31, 1987. Under the Lease Agreement, Bergendahl was to use the property for purposes of operating an automobile and tractor service station.
4. The parties executed a subsequent and similar lease for the period of August 1, 1987 to July 31, 1988.
5. Each of the two leases contained a paragraph 2 relating to "rental" which is set out as follows:
 2. RENTAL: No security deposit. As rental Tenant agrees to produce for inspection by the Board of Directors of the Osceola County Co-op Oil Co. receipts of expenses proving he spent at least \$600.00 for the one-year period of this lease or an average of \$50.00 per month on repairs or improvements to the building or property. Also Tenant agrees to buy from Landlord products offered by Landlord on the following basis:

- a. Gasoline--Cardtrol Price Less 2% Discount Payable Every Ten Days
 - b. Tires--Billed at Farmland's Current Manager's Wholesale Cost--Normal Billing Terms
 - c. All other merchandise--10% over manager's wholesale cost or by special arrangement
6. Each lease contained a termination provision stating: "Termination of this lease is upon expiration or upon notice of default." Certain equipment described in paragraph 9 of each lease was agreed to be part of the premises. It was not to be removed.
 7. Bergendahl did not pay for products he purchased from Co-op between June 1, 1987 and August 31, 1987, so the Co-op brought an action in the Iowa District Court for Osceola County seeking judgment against Bergendahl for \$8,273.40 and for a Writ of Attachment pursuant to Iowa Code 570.5. The petition was filed in September of 1987.
 8. A prejudgment Writ of Attachment was issued, and based upon the Writ, the Osceola County sheriff levied on certain tools, equipment, inventory and machinery of the debtor. A list of equipment is shown on a copy of the notice of levy which is Exhibit "4". The levy was served on approximately September 23, 1987.
 9. Following the levy, the debtor on October 1, 1987 filed a "Notice of Exemption" in the state court proceeding. He claimed certain identified pieces of property as exempt as tools of the trade. A freezer and hose were identified as exempt household goods and certain items were identified as items belonging to third parties.
 10. Bergendahl made improvements to the premises approximating \$1,300.00 in value in a six-month period during the second lease term. At the time of the levy he did not believe he owed any "rent."
 11. There was evidence introduced at trial to indicate a dispute between the parties over whether Bergendahl was permitted under the lease to purchase supplies and products, other than gasoline, from other vendors. The Court does not believe that resolution of this dispute is material to the matter now before it.
 12. At the time of the levy by the sheriff, Bergendahl was still engaged as a mechanic and some of the tools were used by him for that purpose.
 13. Before being forestalled by the levy, Bergendahl and his wife, Rose, had scheduled an auction for September 27, 1987 in an effort to sell some or all of the shop equipment, tools and inventory. The auction was not held. Bergendahl testified that it was his intent to sell if he could obtain sufficient money at the auction to pay off the Co-op.
 14. On about September 21, 1987, Bergendahl had requested the local electric company to terminate service to the station.
 15. The following property, according to the lease and the testimony, is property belonging to Co-op and is not personal property of the debtor: hoist; air compressor; tire changer; tire cage; soft drink machine; furnace; garbage dumpster and water heater.
 16. At the time of trial, Bergendahl was employed by Jeddelloh Ford in Sibley, Iowa as a mechanic. Also he intends to do automotive repair work at his home. Without his tools, the debtor states, he cannot reorganize. Bergendahl is supposed to supply his own tools for his work at Jeddelloh.

DISCUSSION

Bergendahl's complaint against Co-op is in two Counts. The first alleges that the lien of Co-op against debtor's personal property is for rent and is therefore avoidable pursuant to 11 U.S.C. 545. He seeks avoidance of the landlord's lien under 545 and a turnover by Co-op of the personal property levied upon.

The second Count adds the theory that the attachment of the personal property constituted an avoidable preference.

Defendant, Co-op, resists the theories of the plaintiff arguing that the debtor in a Chapter 13 has no standing to request turnover of assets or to invoke the avoiding powers of Chapter 5 of the Code. These powers, it says, are reserved to the Chapter 13 trustee.

The Co-op also argues that its lien cannot be avoided in nonexempt property, and that some of the property which the debtor seeks to have returned is non-exempt property. Co-op requests adequate protection of its interest in any property to be returned to the debtor.

The relationship between the parties is that of landlord/ tenant.

Iowa Code 570.1 creates in favor of landlord a statutory lien for rent. It states as follows:

A landlord shall have a lien for the rent upon all crops grown upon the leased premises, and upon any other personal property of the tenant which has been used or kept thereon during the term and which is not exempt from execution.

Such lien may be enforced by attachment. Iowa Code 570.5.

Prior to filing of the bankruptcy case, the landlord sought enforcement of its statutory lien by the filing of its action in the state court. In aid of that lawsuit, the Co-op obtained a prejudgment attachment.

The suit for the rent is the principal action, however, and the obtaining of the attachment is merely an auxiliary proceeding in aid thereof. Pickler v. Lanphere, 209 Iowa 910, 227 N.W. 526, 528 (1929)

The landlord's lien does not date from the levy by the sheriff as a result of the writ. Farmers' Grain & Mercantile Co. v. Bensoni 195 Iowa 695, 193 N.W. 14, 16 (1923).

Instead, the lien attaches to personal property brought or used upon the premises during the term of the lease at the time such property is brought upon the leased premises. Gilbert, Hedge & Co. v. Greenbaum, Schroder & Co., 56 Iowa 211, 9 N.W. 182 (1881).

As a statutory lien, it is wholly avoidable by the trustee under 11 U.S.C. 545(3).

The complaint of the debtor alleges in paragraphs 4 and 6 of Count I and by reference in paragraph 1 of Count IT that the lien of Co-op is a lien for rent. This allegation is admitted by Co-op.

At trial, the debtor's counsel argued that the lien was not really a lien for rent because the monies owed were not for "rent" but for purchases from Co-op.

This court has doubts as to whether the \$8,273.40 claimed to be due by Co-op is in the nature of rent. But nonetheless, it is too late in the day for the debtor to dispute that issue, having alleged in the pleadings that the lien was for rent and that allegation having been admitted.

The court finds that the lien claimed by Co-op is for rent pursuant to Iowa Code 570.1 and that such lien is avoidable pursuant to 11 U.S.C. 545(3).⁽¹⁾

The issue of standing raised by the defendant is more difficult of resolution.

Both 11 U.S.C. 545 and 547 are traditional avoiding powers available to a "trustee" under the Code.

Co-op argues that the debtor is not a "trustee" vested with avoiding powers under Chapter 13.

The issue of whether a Chapter 13 debtor possesses the avoiding powers of Chapter 5 of the Code has been an issue much in dispute, particularly as it relates to a Chapter 13 debtor's use of 11 U.S.C. 522(f) and (h).

There are many cases involving the avoiding powers of a Chapter 13 debtor with regard to exempt property. Nearly all bankruptcy courts issuing opinions on this matter have ruled that a Chapter 13 debtor may avoid liens on exempt property. This is also true of the Bankruptcy Court for the Northern District of Iowa. In re Ulrich, No. 85-01042C (Bankr. N.D. Iowa March 3, 1986). The Court in the Northern District has similarly ruled under Chapter 12 of the Code. in re Dykstra, No. 87-00441S, Contested No. 70933 (September 29, 1987). In Dykstra, id., the court set out the various rationales for permitting the use of 522 lien avoidance in a Chapter 13.

The question now presented is whether the Chapter 13 debtor has avoiding powers unrelated to 522 of the Code.

The plaintiff in this case requests turnover under 542 of property presumably in the possession of the defendant Co-op as a result of the levy under Iowa Code 570.5. There are no allegations in the complaint to indicate that he was proceeding under 11 U.S.C. 522(h) so as to avoid a landlord's lien on exempt property under 545 or 547. The debtor instead appears to move the court's attention directly to 545 and 547, therefore requiring a decision as to whether the debtor in a Chapter 13 possesses such avoidance powers.

There is also a split of authority on this issue, although it is not an even one.

Courts strictly construing the Bankruptcy Code and particularly Chapter 13 have found that the Code does not vest the debtor with avoiding powers. They point out, essentially, that there is no provision, such as 11 U.S.C. 1107, which would grant to a debtor in a Chapter 13 case the avoiding powers, which in Chapter 5 are specifically described as powers of the trustee.⁽²⁾

A second line of cases interprets the Code differently. These cases say that 11 U.S.C. 103(a) makes chapter 5 applicable to cases under Chapter 13 and that the availability of the avoiding powers in a Chapter 13 is not exclusive to the trustee. Freeman v. Eli Lilly Federal Credit Union (In re Freeman), 72 B.R. 850 (Bankr. E.D. Va. 1987); Ottaviano v. Sorokin & Sorokin, P.C. (In re Ottaviano), 68 B.R. 238 (Bankr. D. Conn. 1986); In re Einoder, 55 B.R. 319 (Bankr. N.D. Ill. E.D. 1985); In re Carr, 34 B.R. 653 (Bankr. D. Conn. 1983); In re Hall, 26 B.R. 10 (Bankr. N.D. Fla. 1982); and In re Boyett, 33 B.R. 10 (Bankr. N.D. Texas 1983). See Russo v. Ciavarella (In re Ciavarella), 28 B.R. 823 (Bankr. S.D. N.Y. 1983).

The court in In re Einoder, 55 B.R. 319 (Bankr. N.D. Ill. E.D. 1985) in resolving the standing issue went beyond the debtors' efforts to use 11 U.S.C. 547 through 11 U.S.C. 522(h). In ruling that the Chapter 13 debtor had full avoiding powers under Chapter 5, the court analyzed the problem practically as well as legally. The trustee, said the court, from the standpoint of incentive, time and effort, is not the most suitable person to pursue all avoiding power actions in a Chapter 13 case. The most appropriate person is the debtor.

This court too believes that the debtor is the most suitable party to assert avoiding powers in his Chapter 13 case.

Also, in a Chapter 13 case, the decision of whether to use an avoiding power is often most logically the debtor's. There may be instances where the debtor, in his best interest, may seek not to recover property under the avoiding powers. So long as the best interest test of 11 U.S.C. 1325(a)(4) is met, taking into consideration unavoids, but avoidable transactions, and so long as the debtor meets the other requirements of 1325, there may be no motive for a debtor to assert an avoiding power. If the debtor's plan can satisfy the confirmation standards of 11 U.S.C. 1325, there may be no reason for the trustee to desire to pursue any avoidance actions.

The debtor, however, may want to and need to avoid transactions using these powers in order to carry out his plan of rehabilitation. It is not practical for the Chapter 13 case trustee to carry out all such litigation.

Following the majority viewpoint, this court concludes that the Chapter 13 debtor has avoiding powers under Chapter 5 of the Bankruptcy Code.

To say that the Chapter 13 debtor has avoiding powers, and that in particular the landlord's lien in this case is avoidable, does not necessarily mean that the lien shall be avoided.

Chapter 13 is unlike either Chapter 7 or Chapter 11 of the Code. Chapter 13 (like Chapter 12 (11 U.S.C. 1208)) gives the debtor an absolute right to dismiss his case. 11 U.S.C. 1307(b); it is a totally voluntary chapter.

It could unfortunately, therefore, be a vehicle for abuse.

It is true that when a Chapter 13 case is dismissed at the request of the debtor, the dismissal reinstates a proceeding or

custodianship superceded under 543 of the Code or reinstates any transfers avoided under 545 or any other avoiding powers. 11 U.S.C. 349(b)(1)(A), (B) and (C).

This may be of little consolation for a creditor where the property recovered from him by the debtor by the use of the avoiding powers is destroyed, exhausted, lost or depreciated.

One court has held that while a Chapter 13 debtor has the full avoiding powers, his use of them can be limited to the recovery of assets "necessary for the performance of the debtor's plan." Berry v. Pattison (In re Berry), 30 B.R. 36, 38 @Bankr. E.D. Mich. S.D. 1983).

This court believes such a consideration is important in a Chapter 13 case.

The undersigned therefore determines under the circumstances of this case that while the landlord's lien of Co-op is avoidable, a judgment avoiding Co-op's landlord's lien shall not be entered absent confirmation of a plan of rehabilitation of the debtor in which the tools, equipment and inventory, which are the subject of this adversary action, are used either for liquidation and distribution to creditors or for the earning of future income under the plan.

This, however, does not answer the question of turnover under 11 U.S.C. 542 raised by the debtor. That question cannot be answered in this proceeding. The property which is the subject of this adversary was levied upon by the Osceola County sheriff. This court finds and concludes that the sheriff is the custodian of the attached property and is a custodian within the meaning of 11 U.S.C. 543. There has been no evidence to the contrary. If Co-op is in possession of any of the items of inventory or equipment, it must be at the convenience

of the county sheriff.⁽³⁾ Although it may be the responsibility of the sheriff to surrender possession to the debtor under 11 U.S.C. 543, that question is not before this court.

CONCLUSIONS OF LAW

The lien of Co-op on the personal property of Bergendahl is a landlord's lien under Iowa Code 570.1. The lien is avoidable by the debtor in such property under 11 U.S.C. 545(3).

ORDER

IT IS THEREFORE ORDERED:

1. That the landlord's lien of Osceola County Co-op Oil Co. is avoidable by the debtor as a landlord's lien under 11 U.S.C. 545(3) and such lien shall be avoided upon confirmation of a plan of rehabilitation in which such personal property is used for liquidation and distribution to creditors or for the earning of income under the plan.
2. That any personal property which may be turned over to Bergendahl by the Osceola County sheriff shall remain subject to Co-op's landlord's lien while in the possession of the debtor even if removed from the rented premises.
3. That the following personal property is not property of the debtor but is property of Co-op: hoist, air compressor, tire changer, tire cage, soft drink machine, furnace, garbage dumpster and water heater.

Judgment shall enter accordingly.

SO ORDERED ON THIS 7th DAY OF MARCH, 1988.

William L. Edmonds
Bankruptcy Judge

Filed Stamped 3/7/88

1. The court notes that if the underlying claim were not one for rent, the plaintiff would have obtained a pre-judgment attachment in aid of a suit for the purchase of goods sold and delivered. The levy made by the sheriff pursuant to the writ of attachment would therefore be a lien pursuant to Iowa Code 639.28 effective upon the day of the levy. To the extent the lien would be created pre-judgment on suit for the purchase of goods, that lien under the facts of this case would be preferential transfer of property pursuant to 11 U.S.C. 547. Under 11 U.S.C. 547(b), a trustee may avoid a transfer of an interest to 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; . . . (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; (C) such creditor received payment of such debt to the extent provided by the provisions of this title." Were the claim in this matter not for rent, the levy by the sheriff would be a preferential transfer.

2. In re Driscoll, 57 B.R. 322 (Bankr. W.D. Wisc. 1986); Walls v. Appalachian Tire Products, Inc. (In re Walls), 17 B.R. 701 (Bankr. S.D. W.Va. 1982); In re Carter, 2 B.R. 321 (Bankr. D. Colo. 1980).

3. If Co-op possesses the property independently of the sheriff's levy, it would be required to surrender the property to the debtor pursuant to 11 U.S.C. 541, 542 and 1306(b). The debtor would then possess the property subject to the unavowed lien.