

In the United States Bankruptcy Court

for the Northern District of Iowa

CHARLES JOSEPH MATHENY

Debtor(s).

Bankruptcy No. L-92-00520-C

Chapter 7

DENNIS CURRELL

Plaintiff(s)

Adversary No. 93-1059LC

vs.

MCCOOL & MCCOOL P.C.

Defendant(s)

On July 19, 1993, the above-captioned matter came on for trial pursuant to assignment on the Plaintiff's Complaint to Recover Preference. The Plaintiff appeared by Trustee Dennis Currell. The Defendant law firm appeared by Attorney Mark McCool. Evidence was presented after which the Court took the matter under advisement.

Trustee Dennis Currell ("Trustee") seeks to recover \$700.00 from McCool and McCool, P.C. ("Defendant"). Debtor Charles Matheny paid these fees to Defendant on the day he filed his voluntary petition for bankruptcy. The \$700.00 payment satisfied indebtedness owed for legal services the firm's partner, Janice McCool, rendered in Debtor's dissolution proceedings.

Trustee alleges that this payment is a preferential transfer which may be avoided under 11 U.S.C. sec. 547(b). Defendant asserts as affirmative defenses that 1) the payment was made in the ordinary course of business under sec. 547(c)(2) and 2) the payment did not diminish the bankruptcy estate because Debtor paid the \$700 out of his exemptible 1991 income tax refunds. The tape and transcript from Debtor's Sec. 341A Meeting of Creditors was admitted into evidence. Debtor testified at the meeting that he paid Defendant's \$700 legal fee from his State and Federal income tax refunds.

The record establishes that Debtor made the \$700 payment for Defendant's benefit on account of an antecedent debt within 90 days before filing the petition while Debtor was insolvent. Defendant received more than it would have eventually been entitled to in Debtor's Chapter 7 liquidation. The Court finds

that Trustee has proven all requisite elements of a sec. 547(b) preferential transfer.

The fact that the \$700 payment was made for past legal services not related to bankruptcy has no effect on Trustee's power to avoid the payment. Under such circumstances, attorneys are in no better position than any other prepetition creditor. In re Pulliam, 96 B.R. 208, 209 (Bankr. W.D. Mo. 1986). It is clear "that for past services the claim of a lawyer stands in no better position than that of a physician or merchant." In re Darke, 18 B.R. 510, 514 (Bankr. E.D. Mich. 1982).

The "ordinary course of business" exception of sec. 547(c)(2) is not applicable to this preferential transfer. No precise legal test exists to determine whether a payment falls within the sec. 547(c)(2) exception. Lovett v. St. Johnsbury Trucking, 931 F.2d 494, 497 (8th Cir. 1991). The court must engage in a peculiarly factual analysis. Id. The defending creditor needs to demonstrate some consistency in the transfer with other business transactions between the debtor and the creditor. Id.

The sec. 547(c)(2) exception contemplates normal credit transactions. In re Herman's Top & Bottoms, Inc., 88 B.R. 442, 444 (Bankr. S.D. Fla. 1988). It does not ordinarily apply to preferential transfers of attorney fees. Id. Compare Herman's Top, 88 B.R. at 444 (payment for legal representation of debtor in defense of collection actions was not in ordinary

course of business) with In re Investment Bankers, Inc., 136 B.R. 1008, 1017 (D. Colo. 1989) (debt incurred in ordinary course of business where law firm had represented debtor securities broker for years).

Defendant has not established that it had the type of business relationship with Debtor that is contemplated by sec. 547(c)(2). Debtor was not in the business of contracting for legal services relating to dissolution proceedings. There is no evidence in the record that Defendant and Debtor had other business transactions. The \$700 payment does not constitute a normal business credit arrangement. The Court concludes that the debt did not arise "in the ordinary course of business".

Defendant's final argument asserts that because Debtor paid the \$700 with exemptible tax refunds and as exempt funds are not available to the trustee as property of the estate, the trustee should not be allowed to avoid the transfer. This argument has been rejected by other courts. In re Wickstrom, 113 B.R. 339 (Bankr. W.D. Mich. 1990), considered a debtor's transfer of exemptible worker's comp benefits and exemptible real estate. The court concluded that the fact that the preferential transfer involved exemptible property does not protect it from the trustee's avoidance powers. Id. at 345. When a debtor voluntarily transfers potentially exempt property to a third party prepetition, all the interest of the debtor in the property terminates and debtor waives the right to claim the property as exempt. Id. at 345-46.

Other courts have applied the "diminution of estate doctrine" or a "no harm, no foul" rule to defeat the trustee's avoidance powers. Id. at 347. However, these holdings are holdovers from the old Bankruptcy Act under which exempt property was not property of the estate. Id. Under the new Code, all of debtor's property is property of the estate. Id.

Wickstrom held that the trustee may avoid prepetition transfers of exempt or exemptible property. Id. at 350. The right to assert property as exempt belongs only to the debtor. Id. at 351. Because the right exists only for the benefit of the debtor, it may not be asserted by creditors. Id. In re Rundlett, 149 B.R. 353, 358 (Bankr. S.D. N.Y. 1993), followed similar reasoning and rejected the diminution of estate argument. Cf. 11 U.S.C. § 522(h) (in some circumstances, debtor may avoid involuntary preferential transfer to extent the property could have been exempted).

The Court concludes that the exemptibility of the property Debtor transferred to Defendant is irrelevant. The Trustee may avoid the transfer of potentially exempt property. Defendant may not protect the prepetition transfer from avoidance by claiming that Debtor could have claimed the tax refund as exempt.

WHEREFORE, this Court finds that the Plaintiff has established, by preponderance of evidence, its' Complaint to Recover Preference.

FURTHER, the Complaint to Recover Preference filed by the Plaintiff is GRANTED.

FURTHER, under 11 U.S.C. sec. 550, the Trustee is authorized to recover, for the benefit of the estate, the property transferred by the Debtor Charles Matheny to the law firm of McCool & McCool, P.C.

FURTHER, judgment is entered in favor of the Plaintiff and against the Defendant in the amount of \$700.00 plus interest and costs.

SO ORDERED this 10th day of August, 1993.

Paul J. Kilburg
U.S. Bankruptcy Judge