

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

In the Matter of: : Chapter 7
: :
MELISSA E. WATERS, : :
: :
Debtor : Case No. 00-30961 RFH
: :
: :
MELISSA E. WATERS, : :
: :
Movant : :
: :
: :
vs. : :
: :
: :
1ST FRANKLIN FINANCE, : :
: :
Respondent :

BEFORE

ROBERT F. HERSHNER, JR.
CHIEF UNITED STATES BANKRUPTCY JUDGE

COUNSEL:

For Movant: BARRY GORDON IRWIN
129 Bryan Street, Suite 101
Athens, Georgia 30601-1801

For Respondent: ROBERT D. BARCUS
RICHARD V. KARLBERG, JR.
34 Peachtree Street, Suite 2180
Atlanta, Georgia 30303

MEMORANDUM OPINION

Melissa E. Waters, Movant, filed on August 18, 2000, a Motion to Avoid Judicial Lien(s). 1st Franklin Finance, Respondent, filed a response on September 8, 2000. Respondent filed on October 4, 2000, an Objection to Property Claimed as Exempt. A hearing on Movant's motion and Respondent's objection was held on November 9, 2000. The Court, having considered the stipulation of facts and the arguments of counsel, now publishes this memorandum opinion.

Movant owed a debt to Respondent. Respondent obtained a judgment against Movant. Movant's employer was served with a summons of continuing garnishment on March 7, 2000.

Movant earned wages after May 12, 2000. Movant's employer withheld, pursuant to the garnishment, the sum of \$1035.87 from Movant's wages. Movant's employer paid the funds into the Franklin County Magistrate Court. The magistrate court disbursed the funds to Respondent.¹ Movant filed a petition for relief under Chapter 7 of the Bankruptcy Code on August 11, 2000. Movant and Respondent agree that the ninety-day preference period began on May 12, 2000. Movant's wages at issue were earned during the ninety-day preference

¹ See Letter from Respondent to the Court dated December 4, 2000.

period. See 11 U.S.C.A. § 547(b) (West 1993).

Movant listed the funds on Schedule B - Personal Property of her bankruptcy petition. Movant claimed the funds as exempt property on Schedule C - Property Claimed as Exempt. Respondent filed a timely objection to Movant's claim of exemptions. The Chapter 7 trustee of Movant's bankruptcy estate has not attempted to avoid as a preferential transfer the garnishment of Movant's wages. See 11 U.S.C.A. § 522(h) (West 1993) (debtor may avoid a preferential transfer to the extent the debtor could have claimed the property as exempt if the bankruptcy trustee does not attempt to avoid the transfer).

The facts in the case at bar are identical to the facts in Mathis v. West Central Georgia Bank (In re Mathis).² In In re Mathis, the debtor's employer was served with a summons of garnishment prior to the ninety-day preference period. The debtor earned wages during the ninety-day preference period. The debtor's employer withheld funds from the debtor's wages. The debtor's employer paid the funds into the state court. The state court disbursed the funds to the creditor prior to the filing of the debtor's bankruptcy petition. This Court held that the debtor could recover the

² Chapter 7 Case No. 95-52540, Adv. No. 95-5073 (Bankr. M.D. Ga. March 27, 1996) (Hershner, J.). A copy of that decision is attached to this memorandum opinion. See also In re Johnson, 239 B.R. 416 (Bankr. M.D. Ala. 1999).

funds as an avoidable preferential transfer.

The Court is persuaded that Movant can recover from Respondent the sum of \$1035.87 as an avoidable preferential transfer. Movant can claim as exempt property the \$1035.87. Respondent's judicial lien is avoided to the extent the lien impairs Movant's exemptions.³ 11 U.S.C.A. § 522(f)(1)(A) (West Supp. 2000).

An order in accordance with this opinion will be entered this date.

DATED the 21st day of December, 2000.

ROBERT F. HERSHNER, JR.
Chief Judge
United States Bankruptcy Court

³ Movant, in her bankruptcy petition, contends that Respondent's judicial lien also encumbers Movant's furniture, kitchen furnishings, jewelry, clothing, and personal items. Respondent did not object at the hearing on November 9, 2000, to the avoidance of its judicial lien on this property.

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

In the Matter of:	:	Chapter 7
	:	
TONY EDWARD MATHIS,	:	
	:	
Debtor	:	Case No. 95-52540
	:	
	:	
TONY EDWARD MATHIS,	:	
	:	
Plaintiff	:	
	:	
	:	
vs.	:	
	:	
	:	
WEST CENTRAL GEORGIA BANK,	:	
	:	
Defendant	:	Adversary Proceeding No. 95-5073

BEFORE

ROBERT F. HERSHNER, JR.
CHIEF UNITED STATES BANKRUPTCY JUDGE

COUNSEL:

For Plaintiff:	GEORGE O. HASKELL, III Suite 100 American Federal Building Macon, Georgia 31201
For Defendant:	EMMETT L. GOODMAN, JR. Suite 800 Fulton Federal Building 544 Mulberry Street Macon, Georgia 31201

ATTACHMENT

MEMORANDUM OPINION

Tony Edward Mathis, Plaintiff, filed on October 5, 1995, a "Motion to Restore Garnishment Proceeds to Debtor."⁴ West Central Georgia Bank, Defendant, filed its response on October 19, 1995. Plaintiff's complaint came on for a hearing on January 8, 1996. The Court, having considered the stipulation of facts and the arguments of counsel, now publishes this memorandum opinion.

FINDINGS OF FACT

The relevant facts are not in dispute. Plaintiff owed a debt to Defendant. Defendant filed a summons of garnishment on March 8, 1995.⁵ The summons of garnishment was served that same day on Plaintiff's employer (the garnishee).

Plaintiff earned certain wages after May 16, 1995.⁶ Plaintiff's employer withheld, pursuant to the garnishment, the sum of \$1,678.23 from Plaintiff's wages. Plaintiff's employer paid the garnished funds into state court. The state court disbursed the garnished funds to Defendant prior to the filing of Plaintiff's bankruptcy case. Plaintiff and

⁴ Although Plaintiff's pleading is entitled a motion, it is in fact a complaint that commenced this adversary proceeding.

⁵ Defendant apparently obtained a judgment against Plaintiff.

⁶ The ninety-day preference period began on May 16, 1995.

Defendant agree that the ninety-day preference period began on May 16, 1995. Plaintiff's wages at issue were earned during the preference period.

CONCLUSIONS OF LAW

Plaintiff seeks to recover from Defendant the garnished funds (\$1,678.23) as an avoidable preferential transfer. 11 U.S.C.A. § 547(b) (West 1993). Defendant does not dispute that Plaintiff can claim the funds as exempt property. 11 U.S.C.A. § 522(g) and (h) (West 1993); O.C.G.A. § 44-13-100 (1995). Plaintiff has the burden of proving the avoidability of the transfer at issue. 11 U.S.C.A. § 547(g) (West 1993).

The question presented to the Court is whether the transfer at issue occurred on the date Defendant served the summons of garnishment or when Plaintiff actually earned the wages. See Taylor v. Mississippi Learning Institute (In re Taylor), 151 B.R. 772, 775-76 (Bankr. N.D. Miss. 1993).

"The perfection of a lien by garnishment is determined by the law of the state where the garnishment took place." Phillips v. Mbank Waco, N.A. (In re Latham), 823 F.2d 108, 110 (5th Cir. 1987). "In bankruptcy, the existence and power of a garnishment lien is controlled by state law." T.B. Westex Foods, Inc. v. Federal Deposit Insurance Corp. (In re T.B. Westex Foods, Inc.), 950 F.2d 1187, 1991 (5th Cir. 1992);

see also Continental National Bank of Miami v. Tavormina (In re Masvidal), 10 F.3d 761, 763 (11th Cir. 1992) (state law determines effect of writ of garnishment).

Georgia Code section 18-4-20(b)⁷ provides:

18-4-20. Property subject to garnishment generally; claim amount and defendant's social security number on summons of garnishment.

. . . .

(b) All debts owed by the garnishee to the defendant at the time of service of the summons of garnishment upon the garnishee and all debts accruing from the garnishee to the defendant from the date of service to the date of the garnishee's answer shall be subject to process of garnishment; and no payment made by the garnishee to the defendant or to his order, or by any arrangement between the defendant and the garnishee, after the date of the service of the summons of garnishment upon the garnishee, shall defeat the lien of such garnishment.

O.C.G.A. § 18-4-20(b) (1991) (emphasis added).

Georgia Code section 18-4-111(a)⁸ provides:

18-4-111. Property, money, or effects subject to continuing garnishment.

(a) All debts owed by the garnishee to the defendant at the time of service of summons of continuing garnishment upon the garnishee and all debts accruing from the garnishee to the defendant from such date of service to and including the one hundred seventy-ninth day thereafter shall be subject to process of continuing garnishment; and no payment made by the garnishee to the defendant or to his order or by any arrangement between the defendant and the garnishee after the date of the service of

⁷ O.C.G.A. § 18-4-20(b) (1991).

⁸ O.C.G.A. § 18-4-111(a) (1991).

the summons of continuing garnishment upon the garnishee shall defeat the lien of such garnishment.

O.C.G.A. § 18-4-111(a) (1991) (emphasis added).

Georgia law is thus clear that debts owed by the garnishee at the time the garnishment summons is served and all debts as they accrue are subject to the summons of garnishment.

"Garnishment did not exist at common law. It was not created by statute in Georgia until 1822." Worsham Brothers Co. v. Federal Deposit Insurance Corp., 167 Ga. App. 163, 305 S.E.2d 816, 818 (1983), cert. denied.

"Since our garnishment laws are in derogation of the common law [they] must accordingly be strictly construed" Travelers Insurance Co. v. Trans State, Inc., 172 Ga. App. 763, 324 S.E.2d 585, 586 (1984).

"Clearly, it was the legislature's intent to allow a garnishor to obtain a garnishment lien only on the property over which the garnishee exercised dominion or control. '[T]he garnishment lien is intended to reach something actually due the defendant and which the defendant could have forced the garnishee to pay.'" Parham v. Lanier Collection Agency & Service, Inc., 178 Ga. App. 84, 341 S.E.2d 889, 891 (1986), cert. denied.

"[T]he test of whether funds in the hands of a third person are subject to garnishment is whether or not the original defendant [the employee] could himself recover such

funds by suit directly against the garnishee." Carter v. Sherwood Plaza, Inc., 118 Ga. App. 612, 164 S.E.2d 867, 868 (1968), cert. denied.

Defendant relies upon Askin Marine Co. v. Conner (In re Conner).⁹ In that case, prior to the ninety-day preference period, the debtor's employer was served with a summons of garnishment and paid into state court the garnished funds. The state court disbursed the garnished funds to the creditor within the preference period. The Eleventh Circuit Court of Appeals held that the debtor could not set aside the transfer as an avoidable preference.

The facts presented in In re Conner are distinguishable from those in the case at bar. In In re Conner, the wages subject to garnishment were earned prior to the preference period. In the case at bar, the wages at issue were earned during the preference period. Subsequent to In re Conner, two bankruptcy courts in Georgia have held that a garnishment which attaches to wages a debtor earns during the preference period may be avoided as a preferential transfer even though the summons of garnishment predates the preference period. See Kentucky Finance, Inc. v. Newell (In re Newell), 71 B.R. 672 (Bankr. M.D. Ga. 1987); Ellenberg v. General Motors Acceptance Corp. (In re Morton), 44 B.R. 750 (Bankr. N.D. Ga. 1984).

⁹ 733 F.2d 1560 (11th Cir. 1984).

In Taylor v. Mississippi Learning Institute (In re Taylor),¹⁰ the bankruptcy court stated:

Most bankruptcy courts have held that wages garnished within the 90 day preference period, pursuant to a writ of garnishment served prior to the preference period, are avoidable under § 547(b). These cases held that under § 547(e)(3), the debtor's wages cannot be transferred until they have been earned, notwithstanding the time of the service of the writ of garnishment. Therefore, wages earned, withheld, and paid to the garnishing creditor within 90 days preceding bankruptcy can constitute avoidable preferences even if the writ of garnishment were served before the preference period commenced.

151 B.R. at 777.

The Court also has considered Grant v. Kaufman (In re Hagen),¹¹ a decision by the Eleventh Circuit Court of Appeals. In In re Hagen, the debtor was injured in an automobile accident. The debtor signed a contingent fee agreement with an attorney on March 20, 1984. A settlement on May 14, 1985, resulted in a fee being paid to the attorney. The debtor filed a Chapter 7 bankruptcy case on July 1, 1985. The bankruptcy trustee argued that the fee paid to the attorney was a preferential transfer. The Eleventh Circuit Court of Appeals held that the fee payment was not a preferential transfer because, under Florida law, an attorney's charging lien relates back in time to the commencement of the attorney's representation. In In re

¹⁰ 151 B.R. 772 (Bankr. N.D. Miss. 1993).

¹¹ 922 F.2d 742 (11th Cir. 1991).

Hagen, the Eleventh Circuit was applying Florida law. In the case at bar, the Court is applying Georgia law.

Turning to the case at bar, "[a]n employee does not acquire rights to his wages until he has earned them. Consequently, even though generally the service of summons of garnishment is the critical point for dating a transfer as [Askin Marine Co. v. Conner (In re Conner)] clearly holds, the critical point for dating a transfer where the debtor has not acquired rights to the property is the date those rights are acquired." In re Morton, 44 B.R. at 751-52.

Defendant has not demonstrated that its lien related back to the date of service of its summons of garnishment. Compare In re Hagen, 922 F.2d at 744. The Court is persuaded that Plaintiff may recover from Defendant the sum of \$1,678.23 as an avoidable preferential transfer.

An order in accordance with this memorandum opinion will be entered this date.

DATED the 27th day of March, 1996.

ROBERT F. HERSHNER, JR.
Chief Judge
United States Bankruptcy Court

CERTIFICATE OF SERVICE

I, Carolyn Hubbard, certify that a copy of the attached and foregoing was mailed to the following:

Mr. Barry Gordon Irwin
Attorney at Law
129 Bryan Street, Suite 101
Athens, GA 30601-1801

Mr. Robert D. Barcus
Attorney at Law
34 Peachtree Street, Suite 2180
Atlanta, GA 30303

Mr. Richard V. Karlberg, Jr.
Attorney at Law
34 Peachtree Street,, Suite 2180
Atlanta, GA 30303

Mr. Ernest V. Harris
Attorney at Law
Post Office Box 1586
Athens, GA 30603

This 21st day of December, 2000.

Carolyn Hubbard
Deputy Clerk
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

In the Matter of: : Chapter 7
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MELISSA E. WATERS, : :
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Debtor : Case No. 00-30961 RFH
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MELISSA E. WATERS, : :
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Movant : :
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: :
vs. : :
: :
: :
1ST FRANKLIN FINANCE, : :
: :
Respondent :

ORDER

In accordance with the memorandum opinion entered this date; it is

ORDERED that the Objection to Property Claimed as Exempt filed on the 4th day of October, 2000, by 1st Franklin Finance, Respondent, hereby is overruled; and it is further

ORDERED that the Motion to Avoid Judicial Lien(s) filed on the 8th day of September, 2000, by Melissa E. Waters, Movant, hereby is granted; and it is further

ORDERED that the judicial lien held by Respondent against Movant hereby is avoided to the extend the lien impairs Movant's exemptions; and it is further

ORDERED that Movant hereby is allowed to claim as exempt property the sum of \$1035.87; and it is further

ORDERED that Movant shall recover from Respondent the sum of \$1035.87 as an avoidable preferential transfer, with interest to run from the date of this judgment at the legal rate until this obligation is paid.

SO ORDERED this 21st day of December, 2000.

ROBERT F. HERSHNER, JR.
Chief Judge
United States Bankruptcy Court

CERTIFICATE OF SERVICE

I, Carolyn Hubbard, certify that a copy of the attached and foregoing was mailed to the following:

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Mr. Ernest V. Harris
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Post Office Box 1586
Athens, GA 30603

This 21st day of December, 2000.

Carolyn Hubbard
Deputy Clerk
United States Bankruptcy Court