

INFORMATION SHEET

CASE NAME: James Ray and Cathy Marie Edwards

CASE NUMBER: 97-40637(3)7

ADVERSARY NUMBER: 97-4059

INTEROFFICE NUMBER: 98S-3

COMPUTER NAME:u:\wschmein\opinions\1998\edwards

DATE ENTERED: Feb. 19 YEAR: 1998

JUDGE: Stosberg

KEY WORDS AND/OR CODE SECTIONS: KRS 378.060; 378.070; CR 69.02;
CR 5.02; preference; garnishment lien.

SUMMARY: Court held that service of the garnishment order is the appropriate date of the transfer, for purposes of determining whether a preferential transfer has occurred within the Ky. 180-day period. In this case, the garnishment order was served on the employer outside of the 180-day period and the garnishment lien was perfected on the date of service. Therefore, the Trustee was not allowed to recover the preferential transfer from the judgment creditor.

UNITED STATES BANKRUPTCY COURT
FOR THE
WESTERN DISTRICT OF KENTUCKY

IN RE:)
)
JAMES RAY EDWARDS)
CATHY MARIE EDWARDS)
 Debtors) Case No. 97-40637(3)7
)
)
RUSS WILKEY, Trustee)
 Plaintiff) A.P. No. 97-4059
)
)
vs.)
)
COMMUNITY METHODIST HOSPITAL)
 Defendant)

MEMORANDUM

This adversary proceeding is fully briefed and submitted for decision on the record. The Trustee seeks to recover as a preferential transfer \$1,438.50 in garnishments collected post-judgment by the Defendant, Community Methodist Hospital (the "Hospital").

The Trustee filed a complaint to recoup from the Hospital money garnished within six (6) months of the debtor's bankruptcy filing. Recognizing that the Hospital did not recover any money within ninety (90) days of the filing, the Trustee relies upon the Kentucky preferential transfer statutes. Ky. Rev. Stat. Ann. ("KRS") § 378.060 and § 378.070.

This Court has determined in prior cases that the Trustee is

permitted to use the avoiding powers of 11 U.S.C. § 544(b) to attack a preference under the Kentucky preference statutes. See *In re Terry Lynn Goodman (Wilkey v. Bellsouth Telecommunications)*, Case No. 97-40055; A.P. No. 97-4042 (W.D. Ky. 12/17/97), adopting the position of the Sixth Circuit in *Perkins v. Petro Supply Company, Inc. (In re Rexplore Drilling, Inc.)*, 971 F.2d 1219, 1221 (6th Cir. 1992). In order to prevail under the Kentucky preference statute, the Trustee must prove that the debtor was insolvent at the time of the transfer.

However, we need not address the question of the debtor's insolvency as the transfer to the Hospital was perfected upon service of the garnishment order on the employer, which occurred outside of the 180 day period preceding the debtor's bankruptcy filing. Thus, there exists no preferential funds for the Trustee to recover.

Factual Background

The debtors filed bankruptcy on May 5, 1997. On September 5, 1996, the Hospital obtained a \$1,851.98 judgment against the debtors in the Henderson Circuit Court. On September 10, 1996, the Hospital secured an order of garnishment, and on September 19, 1996, served the garnishment order, by mail, on the debtor's employer.

The Hospital received the following garnishments:

October 17, 1996	\$191.34
October 26, 1996	\$275.14
November 13, 1996	\$229.01
November 25, 1996	\$192.96
December 11, 1996	\$304.88
January 2, 1997	\$241.87
January 13, 1997	\$220.57
January 28, 1997	\$239.15
February 4, 1997	\$ 10.06

The Hospital did not recover any of the debtor's wages within ninety days of the bankruptcy filing. November 6, 1996 is the one hundred and eightieth (180th) day prior to the bankruptcy filing. Accordingly, the Trustee seeks to recover only the garnishments received by the Hospital between November 13, 1996 through February 4, 1997, which total \$1,438.50.

Legal Analysis

The issue before the Court is whether a transfer, pursuant to KRS 378.060 and 378.070, occurred within the six months preceding the bankruptcy filing. In order to avoid a post-judgment garnishment as a preference, the garnishment order must be served upon the garnishee within the preference period. *In re Battery One-Stop Ltd.*, 36 F.3d 493, 498 (6th Cir. 1994) (interpreting the Ohio garnishment statutes). The Sixth Circuit collected the majority of bankruptcy cases in states with garnishment statutes similar to Ohio's garnishment laws, which

have found the date of delivery of a garnishment order to the garnishee to be the date of perfection of the transfer. *Id.* at 498 (collecting cases).

[S]tates which create a lien upon the service of a writ of garnishment have ruled against the trustee in a preference action when the writ is served prior to the ninety (90)- day period. This is so even if actual payment comes within the ninety (90)- day period.

Id. (quoting, *In re McCoy*, 46 B.R. 9, 11 (Bankr. D. Ariz. 1984)). See also, *In re Arnold*, 132 B.R. 13, 15 (Bankr. E.D. Mich. 1991) (perfection occurs when garnishment notice is served). We find no basis for treating the 180-day period of the Kentucky statute any differently.

The Kentucky garnishment statutes reflect even stronger language than the Ohio garnishment laws analyzed by the Sixth Circuit in the *Battery One-Stop* case. The Kentucky garnishment statute unequivocally sets forth the perfected status of a garnishment lien.

An order of garnishment of earnings, as defined in KRS 427.005, shall create a lien on all nonexempt earnings earned during the pay period in which the order is served on the employer and during those succeeding pay periods which may be designated by the order. (emphasis added)

KRS 425.506(1). According to KRS 425.506(1), the date of the transfer is the date the garnishment lien is created, which is the date of service of the garnishment order upon the garnishee. See *In re Fagan*, 26 B.R. 212, 215 (Bankr. W.D. Ky. 1982).

Kentucky Civil Rule 69.02 provides that a judgment creditor may serve the garnishment order by regular first class mail on the garnishee. In this case, the Hospital mailed the garnishment order to the debtor's employer on September 19, 1996. In Kentucky, service by mail is complete upon mailing. CR 5.02. The transfer of garnished funds to the Hospital was perfected upon service of the garnishment order on the debtor's employer on September 19, 1996, which event occurred more than 180 days before the debtor filed bankruptcy on May 5, 1997. Accordingly, the Trustee may not recover the garnished funds.

We have entered an Order this same date dismissing the Trustee's complaint against the Hospital.

February ___, 1998

DAVID T. STOSBERG
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
FOR THE
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IN RE:)
)
JAMES RAY EDWARDS)
CATHY MARIE EDWARDS)
Debtors) Case No. 97-40637(3)7
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RUSS WILKEY, Trustee)
Plaintiff) A.P. No. 97-4059
)
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vs.)
)
COMMUNITY METHODIST HOSPITAL)
Defendant)

ORDER

Pursuant to the Court's Memorandum entered this same date and incorporated herein by reference,

IT IS ORDERED that the Trustee's Complaint to recover a preferential transfer from Community Methodist Hospital be, and is hereby, **DISMISSED**.

February ____, 1998

DAVID T. STOSBERG
UNITED STATES BANKRUPTCY JUDGE

ENTERED
DIANE S. ROBL, CLERK

February 19, 1998

U.S. BANKRUPTCY COURT
WESTERN DISTRICT OF KENTUCKY