

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ALASKA

In re:

CLINT D. KNIX, d/b/a Scrumptious
Sourdough Company, d/b/a Knix.net, d/b/a
Knix,

Debtor.

Case No. F03-00885-DMD
Chapter 7

Filed On
5/26/06

MEMORANDUM RE: DISCHARGE INJUNCTION

A hearing on debtor's motion to determine possible violation of his discharge injunction was held on May 25, 2006. The debtor contends that two creditors have pursued him in violation of his Chapter 7 discharge.

The first creditor is OSI Alaska Financial Services. It asserts claims for bills arising from Fairbanks Memorial Hospital. Mr. Knix filed for bankruptcy on August 11, 2003. The bills submitted by OSI cover the period of October 6th to October 31, 2003 and November 17th to December 17th, 2003. Mr. Knix's Chapter 7 discharge only discharges debts that arose before August 11, 2003.¹ If Mr. Knix seeks to discharge this debt, he must proceed with a Chapter 13 bankruptcy. He cannot file another Chapter 7 petition until August 11, 2011.²

With regard to debts owed to the State of Alaska, the State has agreed to refund \$896.44 in garnished funds to the debtor. The State has not agreed to release \$1,103.56 in funds garnished from Mr. Knix's 2003 Permanent Fund Dividend. Mr. Knix did claim \$1,000.00 of his 2003 PFD as exempt property in his bankruptcy. 11 U.S.C. §527(f) allows a debtor to avoid the fixing of certain judicial liens in exempt property. In a case involving an execution lien, In re Jousma³, a copy of which is attached, the district court affirmed my

¹ 11 U.S.C. §727(b).

² 11 U.S.C. §727(a)(8).

³ 5 A.B.R. 423 (D. Alaska 1998).

decision that an execution lien against a PFD could be avoided. The situation is different here and Jousma may have no application. Until a properly filed motion to avoid lien is pending, however, the court cannot adjudicate such issues.

DATED: May 26, 2006.

BY THE COURT

/s/ Donald MacDonald IV
DONALD MacDONALD IV
United States Bankruptcy Judge

Serve: Debtor
S. Steinberg, Esq.
OSI Financial Services
5/26/06

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re:)
)
JOHN JOUSMA,)
)
 Debtor.) No. A97-0324-CV (HRH)
)
_____)

(Bankr. No. A96-00906-DMD)

DECISION ON APPEAL

Ketchikan Credit Bureau, Inc., appeals the bankruptcy court's order voiding its judicial lien upon debtor John Jousma's Permanent Fund Dividend and granting an exemption in this property.¹ No brief was timely filed in opposition. The court issued an order notifying the other parties that their briefs were delinquent and afforded them a period of time to file such briefs.² No opposing brief was submitted within the additional time allowed and the court notified the parties that it had taken the matter under advisement. Oral argument was not requested and is deemed unnecessary.

Facts

On November 3, 1995, Ketchikan Credit Bureau, Inc., appellant, obtained a judgment against the appellee-debtor, John Jousma, in small claims court. The

¹ Clerk's Docket No. 8.

² Clerk's Docket No. 10.

judgment was not satisfied. On April 1, 1996, Ketchikan Credit Bureau, through its agent Bengaard Services, had a writ of execution for \$416.49 filed against Jousma's Permanent Fund Dividend for 1995. A levy not to exceed \$492.59 was placed to secure payment of the judgment. The Permanent Fund Dividend for 1995 was expected to be paid in October 1996.

On October 10, 1996, the state issued the Permanent Fund Dividend checks. The 1996 dividend was \$1,130.62 and a portion³ was garnished from Jousma's check and was forwarded to the state court via Bengaard Services in accordance with the execution filed. Jousma filed bankruptcy on October 15, 1996. When he filed, Jousma was aware that Ketchikan Credit Bureau had garnished a portion of his Permanent Fund Dividend. Jousma tried twice unsuccessfully to get the garnished funds released to him through state court proceedings on the grounds that his Permanent Fund Dividend was exempt from bankruptcy proceedings. He was successful on his third attempt, and the state court ordered the funds released from the registry of the court to Jousma.⁴ Jousma took possession of the garnished portion of his Permanent Fund Dividend at issue.

³ The exact amount garnished is not clear to the court. The execution was for \$416.49. Bankr. R. at 37, Exhibit 1. Ketchikan Credit Bureau argues that \$492.59 was garnished. Clerk's Docket No. 8. Jousma, in his pleadings before the state court, argues that either \$492.00 or \$492.53 was garnished. Bankr. R. at 30, Ex. 5 at 5, and Bankr. R. at 36.

⁴ Although Ketchikan Credit Bureau refers the court to the record on appeal (Bankr. R. 31, Ex. 1) for a copy of the order from Alaska District Court Judge Stephanie E. Joannides releasing the funds to Jousma, the court did not find such an order located there. However, a copy of the order was located at Bankr. R. 37, Ex. 1.

Standard of Review

The District Court has jurisdiction to hear appeals from bankruptcy court orders. 28 U.S.C. § 158. There are no material issues of fact in dispute. Issues of law are reviewed de novo. In re Devers, 759 F.2d 751 (9th Cir. 1985).

Discussion

The bankruptcy court found that the garnished portion of Jousma's Permanent Fund Dividend falls within the bankruptcy estate and that it was subsequently exempted from the estate. Ketchikan Credit Bureau appeals these findings and urges the court to note that this case has ramifications beyond the dollar amount involved. As a collection agency, Ketchikan Credit Bureau routinely reduces to judgment cases which cannot otherwise be collected because only a judgment creditor can execute upon a debtor's Permanent Fund Dividend. The Alaska Permanent Fund Division only accepts executions between April 1 of each year and the date, usually in October, when the Permanent Fund Dividend is paid out. Each year a number of people whose Permanent Fund Dividends have been executed on file bankruptcy between April 1 and the October pay-out date. Ketchikan Credit Bureau has taken the position that serving an execution on the Permanent Fund Dividend removes whatever property interest the debtor might have had in that property. Therefore, if a bankruptcy petition was filed within 90 days of the execution, the debtor could recover the right to receive the Permanent Fund Dividend as a preference under 11 U.S.C. § 547.⁵ But if, as here, the bankruptcy petition was filed more than

⁵ Under 11 U.S.C. § 547(b)(4)(A), a trustee may avoid any transfer of an interest of the debtor to a creditor if made within 90 days of the filing of bankruptcy.

90 days after execution, Ketchikan Credit Bureau would be entitled to the Permanent Fund Dividend pursuant to its levy.

Filing a petition in bankruptcy creates an estate consisting of all legal and equitable interests of the debtor in property, wherever located and by whomever held. 11 U.S.C. § 541(a). The debtor can then seek to have property in the estate exempted. In a Chapter 7 case, the property of the estate that is not exempted from the state by law is collected by the bankruptcy trustee and is sold. The proceeds of the sale of the property of the estate are then distributed to creditors. If property is exempted from the estate, the debtor can recover it and it cannot be used to pay creditors.

The bankruptcy court found that because Jousma had a legal interest in his garnished Permanent Fund Dividend, it became a part of the bankruptcy estate subject to Ketchikan Credit Bureau's lien. The court reasoned that Jousma retained an interest for two reasons. First, Ketchikan Credit Bureau's execution of the levy did not affect the title because all that Jousma had was a contingent right to payment and that was the only interest subject to execution since the dividend had not yet been paid. Therefore, Ketchikan Credit Bureau simply gained a right to a priority in Jousma's Permanent Fund Dividend. Second, the court felt that Jousma retained significant rights in the funds even after the execution because he could seek an exemption under state and federal law for the garnished amount and because he had the right to see that his Permanent Fund Dividend be applied to nondischargeable items rather than a judgment arising on a general unsecured claim.

Ketchikan Credit Bureau disputes the bankruptcy court's reasoning on the

following grounds: (1) Alaska law should be applied and, under Alaska law, the execution of the levy transferred title of the executed-upon portion of Jousma's Permanent Fund Dividend to Ketchikan Credit Bureau and that portion can only be brought back into the estate if Jousma has significant interests remaining, which he does not; and (2) the right to exempt property does not independently create property rights sufficient to bring property into the estate in order to exempt it.

The court concludes that under Alaska law execution of the levy did not transfer title to the executed-upon portion of Jousma's Permanent Fund Dividend to Ketchikan Credit Bureau. All personal property belonging to the debtor that is not exempt by law is subject to execution. AS 09.35.070. Alaska law exempts from execution 45% of a person's Permanent Fund Dividend. AS 43.23.065. Ketchikan Credit Bureau's execution did not invade the exempt portion of Jousma's dividend. Von Gemmingen v. First Nat'l Bank of Anchorage, 789 P.2d 353 (Alaska 1990), does not support Ketchikan Credit Bureau's position. "A valid levy subjects the judgment debtor's full interest in such accounts to execution, consistent with the priorities, exemptions and other requirements of applicable state and federal law." Id. at 356. But such is not the equivalent of a transfer of title from the judgment debtor. In other words, according to the Ketchikan Credit Bureau, execution takes whatever is executed upon--in this case the garnished portion of Jousma's Permanent Fund Dividend--out of the debtor's possession so it is no longer the property of the debtor. That is not what the court in Von Gemmingen has said. Von Gemmingen addresses whether an escrow account (as distinguished from funds in such account) is considered "property" for purposes of execution, not whether a writ of execution

makes that which is executed the property of the creditor. Id. at 355-56.

Property that has been executed, like the portion of Jousma's Permanent Fund Dividend, may still be deemed part of the bankruptcy estate so long as the debtor retains significant interests in the property. United States v. Whiting Pools, 462 U.S. 198, 210-11 (1983). Significant interests include: ownership of the property, right to a surplus, right to redeem property, and the right to have the validity of a tax (or, in this instance, the validity of the execution) determined by a court.⁶

Ketchikan Credit Bureau disputes the bankruptcy court's finding that Jousma had significant rights to the funds executed upon. Although in this case there would be no right to a surplus or a right to redeem the property (money having been levied upon), and the validity of the judgment has already been determined by a court, this court concludes the bankruptcy court correctly determined that Jousma had significant interests in the portion of his Permanent Fund Dividend which was garnished, although this court's reasoning differs from that set forth by the bankruptcy court. Even after the levy of Jousma's dividend, Ketchikan Credit Bureau was not entitled to receive the funds until authorization was obtained from the court which authorized the writ of execution.⁷ Under state law procedures, Jousma was entitled to and did take exception to disbursement of the funds. The court concludes that

⁶ Camacho v. United States, 190 B.R. 895, 900 (D. Alaska 1995) (right to have tax liability determined by the court); SPS Technologies, Inc. v. Baker Material Handling Corp., 153 B.R. 148, 152 (Bankr. E.D. Pa. 1993) (right to redeem).

⁷ Alaska execution procedures have not been well developed for this court in the briefing. It is clear from Alaska Civil Rule 69(f)(2) that Ketchikan Credit Bureau's agent was required to deposit the funds in question with the Alaska court. Special procedures apply to execution upon Alaska Permanent fund dividends. Alaska Civil Rule 69(h). The latter are not available to this court.

under Alaska execution procedures, the debtor owns the levied property until it is sold by order of the court or, in the case of money, until the court directs payment of the debtor's money to the creditor. Thus, within 90 days of his bankruptcy filing, Jousma still owned the property for purposes of 11 U.S.C. § 541(a), and the garnished portion of Jousma's Permanent Fund Dividend should have become part of the bankruptcy estate subject to Ketchikan Credit Bureau's writ of execution. Mere service of a writ of execution does not divest the judgment debtor of ownership of the money in question.

Conclusion

For the foregoing reasons, the decision of the bankruptcy court is affirmed.

DATED at Anchorage, Alaska, this 10th day of July, 1998.

H. Russel Holland, Judge
District of Alaska