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signed 4-6-00

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In re:

**WILLIAM AARON McMURRAY II,
BARBARA SUE McKEE-McMURRAY,

DEBTORS.**

**CASE NO. 99-41397-7
CHAPTER 7**

**ORDER DENYING TRUSTEE'S OBJECTION
TO DEBTORS' HOMESTEAD EXEMPTION**

This matter was before the Court on October 29, 1999, for a status conference on the trustee's objection to the debtors' homestead exemption claim, and on Adversary No. 99-7090 that she has filed against the debtors. The trustee, Darcy Williamson, appeared by counsel Patricia A. Reeder and Leon B. Graves. The debtors appeared by counsel Frederick Smith. The Court raised the question of the trustee's standing to pursue the homestead objection she was asserting, and the parties were to file briefs on that question. After receiving an extension of time, the trustee filed her brief in January. The debtors have filed no brief and, at their request, Mr. Smith withdrew in February from representing them. The Court notes that the trustee's brief also discusses her standing to assert in Adv. No. 99-7090 an objection to the debtors' discharge based on 11 U.S.C.A. §727(a)(2). The Court did not intend to raise that standing question, so this order will not address it. The Court has reviewed the relevant materials, and is now ready to rule.

FACTS

The debtors occupy a building in Pittsburg, Kansas, in which they reside and conduct a chiropractic business. More than 90 days but less than one year before their chapter 7 bankruptcy

filing, they used eight credit cards to obtain cash advances totaling more than \$65,000. With this money, they paid off a mortgage or contract for deed on the building. At that time, the trustee alleges, the debtors already owed about \$150,000 in credit card debt. When they filed for bankruptcy, the debtors claimed the building was exempt as their homestead. The trustee contends the debtors' use of the cash advances to pay off the debt on the building defrauded the companies ("Cash Advance Creditors") that funded the advances. None of the Cash Advance Creditors, however, has objected to the debtors' homestead exemption claim based on this alleged fraud, and their time to do so has expired.

Despite the Cash Advance Creditors' failure to pursue such a claim, the trustee intends to rely on Kansas case law that might allow those creditors to sue the debtors and obtain a ruling imposing a constructive trust against the homestead for their benefit on the ground the use of the cards defrauded them. If she can succeed in this effort, the trustee contends she could then avoid this constructive trust pursuant to 11 U.S.C.A. §544(b) or §548(a)(1), or perhaps even §105, and preserve it for the benefit of all the creditors of the bankruptcy estate, not just the eight who might have such a constructive trust claim.

DISCUSSION AND CONCLUSIONS

The requirement that a party have standing to bring an action in a federal court derives from the constitutional case-or-controversy limitation on the judicial power of the federal courts. *See* U.S. Const. art. III, §2; *United States v. McVeigh*, 106 F.3d 325, 333-34 (10th Cir. 1997). This limitation applies to bankruptcy courts because they are units of the federal district courts. 28 U.S.C.A. §151. Standing is a jurisdictional concern that courts may raise *sua sponte*. *Juidice v. Vail*,

430 U.S. 327, 331 (1977); *Citizens Concerned for Separation of Church and State v. City and County of Denver*, 628 F.2d 1289, 1301 (10th Cir. 1980), *cert. denied* 452 U.S. 963 (1981).

Here, the standing question that concerns the Court is the trustee's right to assert the Cash Advance Creditors' potential claim that they should be able to obtain a constructive trust against the debtors' homestead because the cash they advanced to the debtors was used to pay off the debt owed on it.

Under Kansas law, a creditor can establish an interest in property superior to a debtor's exemption claim by proving that the debtor wrongfully obtained money from the creditor and used it to purchase or increase his or her equity in the property claimed as exempt. *Long Brothers v. Murphy*, 27 Kan. 375, 379-80 (1882); *Metz v. Williams*, 149 Kan. 647, 648-51 (1939). However, only a creditor with a special or peculiar equity in the money thus used can establish such an interest; creditors with no prior interest in or claim to that money cannot. *Metz*, 149 Kan. at 651; *McConnell v. Wolcott*, 70 Kan. 375, 382-84 (1904). The interest that a creditor with a special or peculiar equity can obtain appears to constitute a constructive trust imposed against the otherwise exempt property. *First American Title Ins. Co. v. Lett (In re Lett)*, 238 B.R. 167, 199-200 (Bankr. W.D. Mo. 1999). What the trustee is trying to do is to establish a constructive trust in favor of the Cash Advance Creditors, and then, based on the same actions by the debtors that made the constructive trust remedy available, to turn around and avoid that trust for the benefit of all the creditors of the estate.

The Court believes, though, that the trustee does not have standing to pursue the first part of her theory because that part would be for the benefit of the Cash Advance Creditors alone, not for the bankruptcy estate. She does not question that the debtors live in the building or that they can properly exempt it as their homestead from all their other creditors. The only case the trustee has cited to

support her claim that she can press the Cash Advance Creditors' possible claim for the imposition of a constructive trust on the debtors' homestead is *Schimmelpenninck v. Byrne (In re Harris Adacom Corp. B.V.)*, 183 F.3d 347 (5th Cir. 1999). That case involved a creditor's claims against a subsidiary of a company in a foreign bankruptcy for alter-ego and single-business-entity liability on the parent company's debt to the creditor. 183 F.3d at 352-53. The Circuit concluded those claims sought to recover or control property of the parent company debtor and were general claims of the debtor's creditors, claims Congress gave the bankruptcy trustee the exclusive right to assert against the debtor's property for the collective benefit of creditors. *Id.* at 358-61. In reaching that conclusion, the court made the following relevant observations:

It is in this perspective that the distinction between general and personal claims is both significant and consistent with the Bankruptcy Code. It is axiomatic that a trustee has the right to bring actions that will benefit the estate. Such claims can either be founded on the rights of the debtor or on the rights of the debtor's creditors. If the right belongs to the debtor's creditors, the distinction between personal and general claims takes on significance: A trustee can assert the general claims of creditors, but is precluded from asserting those creditor claims that are personal. In other words, even if a claim "belongs to" the creditor, the trustee is the proper party to assert the claim, for the benefit of all creditors, provided the claim advances a generalized grievance. [Footnote omitted.]

We understand that characterizing an injury as personal or general traditionally comports with notions of standing. A bankruptcy court has correctly recognized that "[i]njury characterization analysis should be considered as an inseparable component of whether an action belongs to the corporation or individual." [*In re E.F. Hutton Southwest Properties II, Ltd.*, 103 B.R. 808, 812 (Bankr. N.D. Tex. 1989); other citation omitted]. We agree with that position and conflate the injury characterization analysis with not only the first, "belongs to," prong of the *S.I. Acquisition[, Inc. v. Eastway Delivery Service (In re S.I. Acquisition, Inc.)*, 817 F.2d 1142 (5th Cir. 1987)] test but with the second, "recovery or control" prong as well. Consideration of whether a claim is general or personal should aid courts in deciding whether a claim seeks "recovery or control" of property of the debtor. This analysis, we find, helps to crystallize the structure for determining when trustees can or cannot act on behalf of creditors in pursuing claims.

To capsulize this legal framework for determining whether the trustee or an individual creditor is the appropriate actor, we categorize three kinds of action:

- 1) Actions by the estate that belong to the estate;
- 2) Actions by individual creditors asserting a generalized injury to the debtor's estate, which ultimately affects all creditors; and
- 3) Actions by individual creditors that affect only that creditor personally.

The trustee is the proper party to advance the first two of these kinds of claims, and the creditor is the proper party to advance the third. This construction ensures that the estate will not be wholly or partially consumed for the benefit of one creditor, or even a small number of creditors. Moreover, preservation of the estate for the advantage of all creditors will (1) prevent multi-jurisdictional rushes to judgment, (2) save judicial resources, and (3) further the equitable principles of bankruptcy.

183 F.3d at 359-60.

The Court believes the type of claim the trustee is asserting here is the third type identified in *Schimmelpenninck*, claims that affect the Cash Advance Creditors personally. If the trustee could accomplish the first part of her attack, she would have standing to pursue the second part, trying to avoid the constructive trust for the benefit of all the creditors of the estate. But the first part of her attack can benefit all the creditors only if the second part succeeds. If she were to succeed in the first part but fail in the second part, she would have established a constructive trust for the benefit of the Cash Advance Creditors alone, and obtained no benefit for the estate at all. This view of the trustee's attack exposes its flaw: the trustee is not authorized to pursue claims for the benefit of only a few creditors. Furthermore, the Court wonders whether the result the trustee seeks would be equitable. It would impose a \$65,000 encumbrance on the debtors' homestead, returning them to the position they were in before they obtained the cash advances, but would distribute the \$65,000 recovery to all the debtors' creditors pro rata rather than return the full encumbrance to the Cash Advance Creditors who supplied the money that paid off the prior lien, even though they are the only ones with the right to recover the money under applicable state law.

For these reasons, the Court concludes the trustee's objection to the debtors' homestead exemption must be denied.

IT IS SO ORDERED.

Dated at Topeka, Kansas, this _____ day of April, 2000.

JAMES A. PUSATERI
CHIEF BANKRUPTCY JUDGE