

SO ORDERED.

SIGNED this 5th day of December, 2013.



Dale L. Somers

Dale L. Somers
United States Bankruptcy Judge

**Designated for on-line use but not print publication
IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In Re:

**DARREN JERROD BOHANON and
TERESA ELAINE BOHANON,**

DEBTORS.

J. MICHAEL MORRIS, Trustee,

PLAINTIFF,

v.

**EASY CREDIT AUTO SALES, INC. and
TERESA ELAINE BOHANON,**

DEFENDANTS.

**CASE NO. 12-12582
CHAPTER 7**

ADV. NO. 12-5181

**MEMORANDUM OPINION AND ORDER DENYING
TRUSTEE'S COMPLAINT AS TO DEFENDANT EASY AUTO CREDIT**

Following argument held after the filing of a joint stipulation of facts, the Court took under advisement the Trustee's Amended Complaint (1) to Avoid and Recover Preferential Transfer; (2) Turnover; and (3) Damages for Violation of the Automatic Stay as to Defendant Easy Credit Auto Sales, Inc. (Easy Credit). The Trustee, J. Michael Morris, appeared by J. Michael Morris of Klenda, Austerman LLC. Easy Credit appeared by W. Rick Griffin and Rachael A. Doyle of Martin, Pringle, Oliver, Wallace & Bauer, LLP. There were no other appearances. The Court has jurisdiction.¹ Having considered the stipulation of facts, the arguments of counsel, and the written submissions the Court is now ready to rule. For the reasons discussed below, the Court holds that the Trustee may not recover the \$544.35 wages garnished by Easy Credit prepetition by Debtor Teresa Bohanon's employer and that Easy Credit did not violate the automatic stay.

FINDINGS OF FACT.

The parties have stipulated to the facts,² which are as follows. Prepetition, the Debtors Darren and Teresa Bohanon were the defendants and Easy Credit was the plaintiff in litigation filed in Sedgwick County, Kansas District Court. On September 12, 2007, Easy Credit obtained an agreed judgment against the Debtors for \$2,812.07, plus

¹ This Court has jurisdiction over the parties and the subject matter pursuant to 28 U.S.C. §§ 157(a) and 1334(a) and (b), and the Standing Order of the United States District Court for the District of Kansas that exercised authority conferred by § 157(a) to refer to the District's bankruptcy judges all matters under the Bankruptcy Code and all proceedings arising under the Code or arising in or related to a case under the Code, effective July 10, 1984. Furthermore, this Court may hear and finally adjudicate this matter because it is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (F). There is no objection to venue or jurisdiction over the parties.

² Dkt. 76.

interest, fees, and costs, payable \$550 by August 30, 2007 and \$100 per month for 15 months, starting on September 15, 2007. Debtors defaulted on the payment arrangement.

On August 17, 2012, Easy Credit filed a Request for Garnishment and an Order of Garnishment (to Attach Earnings) against Debtor Teresa Bohanon (hereafter Debtor). The Order of Garnishment was served on Debtor's employer, Wesley Medical Center (Wesley). Pursuant to the Order of Garnishment, the employer withheld as follows:

Amount	Pay Period	Pay Date
\$544.35	8/19/12 – 9/01/12	9/07/12
\$500.95	9/02/12 – 9/15/12	9/21/12
\$537.25	9/16/12 – 9/29/12	10/05/12

The Pay Dates listed represent the regular pay dates following the respective pay periods. The employer issued checks to Easy Credit c/o its counsel for the amounts and on the pay dates listed above. Easy Credit presented the September 7 check for \$544.35 for payment and received the funds before September 13. Checks for the wages for the pay periods ending on September 21 (\$500.95) and on October 5 (\$537.25) were also issued to Easy Credit, but were returned to Wesley.

The Debtors filed their Chapter 7 bankruptcy case on September 13, 2012. The second pay period straddled the bankruptcy filing date, with 12/14ths of the wages attributable to the prepetition period. The third pay period was wholly post-petition, and the withholding of wages for this period is not involved in this litigation.

Both Easy Credit and its counsel were given notice of the Bohanons' bankruptcy filing. With knowledge of the bankruptcy filing, Easy Credit filed a Release of Garnishment on October 4, 2012. On October 18, 2012, before any demand for turnover by the Trustee, Easy Credit returned the \$500.95 and \$537.25 checks to the employer. Wesley then paid the wages to Debtor Teresa Bohanon.

The Trustee made demand on Easy Credit on October 29, 2012 for turnover of \$1,045.30, the sum of the wages withheld for the first and second pay periods. He stated that the "debtor's pay records indicate that a total of \$1,045.30 was taken during the ninety (90) days prior to the filing of the bankruptcy. This would appear to be a preference avoidable by the trustee and demand is hereby made for turnover of the same."³ On November 1, 2012, Easy Credit responded to the Trustee's written demand for avoidance and payment of the funds to the Trustee. It declined to turnover the \$1,045.30 and informed the Trustee that Easy Credit "has only retained garnished funds in the amount of \$544.35" and stated that, since Easy Credit "did not receive a transfer of funds in excess of \$600, the transfer is not avoidable."⁴ The Trustee was also informed that the two checks for \$500.95 and \$537.25 had been returned to Wesley "as the funds were garnished post-bankruptcy."⁵

³ Dkt. 76-7,1.

⁴ *Id.* at 2.

⁵ *Id.*

On November 09, 2012, the Trustee filed the initial complaint in this adversary proceeding against Easy Credit and the Debtors, seeking avoidance of \$1,045.30, the sum of the checks for the first and second pay periods, as a preferential transfer to Easy Credit pursuant to 11 U.S.C. § 547.⁶ On November 30, 2012, the Trustee filed the first Amended Complaint, deleting Darren Bohanon as a defendant, amending the amount claimed to be preferential to the \$544.35 from the first pay period plus \$429.39, which is that portion of the \$500.95 earned during the second pay period attributable to prepetition services, and adding a claim for violation of § 363(a)(1) and/or (a)(3) based upon Easy Credit's alleged continuation of a judicial proceeding through return of the check for the second pay period to Wesley.⁷

By agreed order, entered on December 26, 2012, the action was resolved as to the Debtor Teresa Bohanon. This order provides that “debtor received \$429.39, post-petition from a ‘refund’ of earnings garnished pre-petition by creditor, Easy Credit Auto;” that the “trustee may avoid the garnishment lien of Easy Credit Auto pursuant to 11 U.S.C. § 547 and recover the funds . . . from the debtor pursuant to 11 U.S.C. § 550;” and the “debtor will turnover such \$429.39 to the trustee.”⁸ The Debtor has paid this amount.

⁶ Dkt. 1. Future references to Title 11 in the text shall be to section number only.

⁷ Dkt. 9.

⁸ Dkt. 16.

On January 25, 2013, Easy Credit filed a motion for sanctions under Rule 9011 premised upon the Trustee's assertion of a claim under § 363.⁹ By order entered on June 12, 2013, the Court denied the motion without prejudice.¹⁰ By order entered on July 2, 2013, the Court granted the Trustee's motion to amend the complaint.¹¹ The second Amended Complaint was filed July 2, 2013.¹² It adds a claim for damages against Easy Credit for contempt under § 105 premised upon Easy Credit's alleged violation of § 362.

DISCUSSION.

A. Preference Claim.

The Trustee's second Amended Complaint alleges the preceding facts about the garnishment of nonexempt wages for the first and second pay periods. It then alleges as follows:

9. Such pre-petition garnishment attachment constitutes a transfer(s) of an interest of the debtors in property to or for the benefit of a creditor, on account of an antecedent debt, made while the debtors were insolvent, made on or within ninety (90) days before the filing of the petition, that enabled such creditor to receive more than it otherwise would had the transfer not been made and the creditor received payment as provided by U.S.C. The trustee may therefore avoid the transfer(s) of the full amount attached within such ninety (90) days pursuant to 11 U.S.C. §547. The trustee may also recover from defendant Easy Credit,

⁹ Dkt. 26.

¹⁰ Dkt. 53.

¹¹ Dkt. 58.

¹² Dkt. 59.

pursuant to 11 U.S.C. §550, any part of the avoided amount it received (apparently \$544.55), and from the debtors any amount they received after “return” to the employer (apparently \$429.39). Further, the attachment lien should be preserved for the benefit of the estate pursuant to §551, as needed to effect full recovery to the estate.¹³

As to Easy Credit, these allegations relate to two separate but related transfers: (1) the transfer of garnished wages to Easy Credit; and (2) the attachment of Easy Credit’s garnishment lien. The Court will examine each separately, even though they are conflated in the Complaint, the Trustee’s briefs, and in the arguments of Easy Credit.

As to the wage transfers, Easy Credit understands the Trustee to be alleging that two preferential transfers were received by Easy Credit: the first is payment of \$544.35 of pre-petition wages; and the second is \$429.39, which is 12/14th of amount garnished for the second pay period, attributable to the work performed by Debtor pre-petition.¹⁴ Easy Credit acknowledges that the elements of a preferential transfer are satisfied as to the first payment but contends that it may not be recovered by the Trustee because of the exception in § 547(c)(8). It provides, “the trustee may not avoid under this section a transfer . . . if, in a case filed by an individual debtor whose debts are primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is

¹³ Dkt. 59.

¹⁴ Although the Court understands why Easy Credit would reach this conclusion, the Court is not convinced that Easy Credit’s interpretation of the Trustee’s position is correct. Nevertheless, the Court will address whether the transfer to Easy Credit of a check for 12/14th of the wages earned during the second pay period (\$429.39) was preferential.

less than \$600.” Since this exception applies to the aggregate of transfers to a creditor,¹⁵ to be entitled to the defense, Easy Credit must establish that the value of the prepetition portion of the wages for the second pay period (\$429.39) should be not aggregated to the transfer of nonexempt wages for the first pay period.

The Court finds that the second wage withholding did not result in a prepetition payment to Easy Credit because: (1) Easy Credit did not receive the check from Debtor’s employer until September 21, 2012, which was not within 90 days prior to the bankruptcy filing on September 13, 2012; and (2) Easy Credit did not cash the check but returned it to Wesley. Only prepetition transfers may be recovered as preferential. Transfer is defined by § 101(54) to include “each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or an interest in property.” Despite this broad definition, the Supreme Court in *Barnhill*¹⁶ held when there is an allegation of a preferential transfer arising from the debtor’s delivery of an ordinary check to a creditor, there is no transfer of the debtor’s property until the check is honored. The court reasoned that until that time there is no transfer as defined by § 101(54) because the creditor’s “receipt of a check gives the recipient no right in the funds held by the bank on the drawer’s account. Myriad events can intervene between delivery and presentment of

¹⁵ *Wilkey v. Credit Bureau Systems, Inc. (In re Clark)*, 217 B.R. 89 (D.W.D. Ky. 1995); *Electric City Merchandise Co. v. Hailes (In re Hailes)*, 77 F.3d 873 (5th Cir. 1996).

¹⁶ *Barnhill v. Johnson*, 503 U.S. 393 (1992).

the check that would result in the check being dishonored.”¹⁷ In this case, Easy Credit did not receive the check for the second pay period until after the bankruptcy was filed and never cashed the check. There was no pre-petition transfer of wages for the second pay period to Easy Credit.

As Easy Credit argues, the Kansas Wage Garnishment Act supports the position that it was not entitled to a prepetition transfer as to the second pay period. K.S.A. 60-734(c) provides that “the order of garnishment must have the effect of attaching the nonexempt portion of the judgment debtor’s earnings for all pay periods which end while the order is in effect.” Garnishment payments are to be made only after the termination of the pay period. Here the bankruptcy stay arose before the end of the second pay period. The garnishment order was stayed before the end of the second pay period. The aggregate of the preferential wage transfers to Easy Credit is less than \$600.

But there are transfers of another interest of the Debtor to consider, the transfers which occurred when the garnishment lien attached to Debtor’s earnings.¹⁸ If the attachments of the garnishment lien are aggregated to the preferential wage payment for purposes of the *de minimis* exception to preferential transfers, then the Trustee may avoid the \$544.35 wage transfer.

¹⁷ *Id.*, at 399.

¹⁸ In the Agreed Order Resolving Adversary Action as to Debtor (dkt. 16) the Court found that “the trustee may avoid the garnishment lien of Easy Credit pursuant to 11 U.S.C. § 547.”

As stated above, the *de minimis* exception provides, “the trustee may not avoid under this section a transfer . . . if, in a case filed by an individual debtor whose debts are primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than \$600.”¹⁹ The purpose of the exception is “to allow debtors to transfer *small amounts* of money to consumer creditors before the filing of a bankruptcy petition, despite the fact that the transfers might have a preferential effect.”²⁰ Aggregation of all transfers to a single creditor preserves the small preference exception without creating a windfall whereby a creditor receiving several thousand dollars over the 90 day period would be protected from preference liability.²¹ However, the phrase “all property . . . affected” by the transfer must be narrowly “understood to refer to directly affected or altered or released property interests, rather than to the overall outstanding lien or loan.”²²

The avoidance of the transfer of the garnishment lien and avoidance of the cash payment are separate claims. The wording of the *de minimis* exception requires that it be applied separately to each of these claims. It states, “the trustee may not avoid under this section a transfer . . . if . . . the aggregate value of all property that constitutes . . . such

¹⁹ 11 U.S.C. § 547(c)(8).

²⁰ *In re Hailes*, 77 F.3d at 875.

²¹ *Id.*

²² 4 William L. Norton, Jr., and William L. Norton III, *Norton Bankruptcy Law & Practice 3d*, §66:33 at 66-153 (Thomson Reuters/West 2012).

transfer is less than \$600.” “Such transfer” refers to the avoided transfer, not all preference claims against a creditor. The statutory language does not narrow the exception by stating that the trustee may not avoid a transfer if the aggregate value of all property that constitute all transfers to such creditor are less than \$600.

The Court finds that the avoidance of the attachment of the garnishment lien and avoidance of the cash transfer must be considered separately for purposes of the *de minimis* exception. This construction is consistent with the principles of liability of the transferees of avoided transfers. In general, the Trustee’s remedies upon avoidance of these two types of preferences are different. As to a cash transfer, the Trustee is entitled to recovery of the property transferred from the transferee under § 550(a). As to lien avoidance, the lien is automatically preserved for the benefit of the estate under § 551. Avoidance alone is a sufficient remedy, so the transferee has no monetary liability under § 550.²³ The separate consideration of the cash transfer and the lien attachment preserves the purpose of the exception. This case illustrates the adverse result if the value of the avoided cash transfer is aggregated to the probable value of the avoided lien for purposes of the *de minimis* exception. Here there is no doubt that a garnishment lien attached prepetition to nonexempt wages earned during the first pay period and such attachment was a preferential transfer.²⁴ There is also no doubt that the transfer of \$544.35 cash to

²³ 4 *Norton Bankruptcy Law & Practice 3d*, § 70:3 at 70-11.

²⁴ The Trustee and Easy Credit disagree on the legal issue of when a garnishment lien attaches and thus when a transfer occurs for purpose of avoidance of the lien. The Trustee argues that the lien attaches when the work is performed. Easy Credit argues that because under the Kansas wage

Easy Credit was preferential. Assuming the value of the preferential lien is \$544.35, the value of the wages withheld, the Trustee's theory would require that the cash transfer and the lien transfer be aggregated, resulting in a total transfer of \$1,088.70 for the first pay period and the inapplicability of the *de minimis* exception, even though Easy Credit received only \$544.35 cash. Such a construction of the *de minimis* exception would reduce the effective maximum value of the *de minimis* exception as applied to the cash transfer to \$300, contrary to Congressional intent. In the wage garnishment context the purpose of the *de minimis* exception is preserved only if the transfer of the wages resulting from the garnishment is not aggregated with the attachment of the garnishment lien.

For the foregoing reasons, the Trustee has no cause of action against Easy Credit under § 547 for recovery of the payment of nonexempt wages for the first pay period. Although Easy Credit received \$544.35 through garnishment of Debtor's nonexempt wages within 90 days preceding the filing of this bankruptcy case, § 547(c)(8) applies to except the transfer from those which may be avoided since Easy Credit was a creditor of an individual whose debts were primarily consumer debts and the aggregate value of the property transferred during the preference period was less than \$600.

B. Stay Violation and Contempt under § 105.

garnishment statute, K.S.A. 60-734(c), an order of garnishment has the "effect of attaching the nonexempt portion of the judgment debtor's earnings for all pay periods which end while the order is in effect," the lien does not attach and there is no transfer until the end of a pay period. There is no Kansas authority on this question. Because this case can be resolved without addressing the question, the Court declines to predict how the Kansas Supreme Court would rule.

The Trustee in the second Amended Complaint alleges as follows with respect to his stay violation and contempt claims:

The “return” of the \$429.39 portion of the \$500.95 amount [the nonexempt portion of the prepetition wages for the second pay period] . . . , constituted an action of “continuation” of a judicial proceeding commenced before the commencement of the case and/or an act to exercise control over property of the estate. It therefore violated the automatic stay pursuant to 11 U.S.C. § 362(a)(1) and/or (3). The Court should award appropriate damages against Easy Credit. Alternatively, the Court should award damages for contempt under 11 U.S.C. § 105(a).²⁵

In defense, Easy Credit first contends that the Trustee lacks standing to pursue a claim for damages under § 362(k). This contention is correct. That section provides, “Except as provided in paragraph (2), an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys’ fees, and in appropriate circumstances, may recover punitive damages.” The Tenth Circuit BAP has construed this section to mean that a Chapter 7 Trustee cannot recover damages for a stay violation. In *In re C.W. Min. Co.*, the BAP stated, “Based on the well-established precedent of this Court and other circuits, and the plain language of § 362(k), the Court concludes that a trustee acting on behalf of the estate, which is an artificial entity, cannot recover damages under §362(k) for a violation of the automatic stay.”²⁶

²⁵ Dkt. 59.

²⁶ *Rushton v. Bank of Utah (In re C.W. Mining Co.)*, 477 B.R. 176, 194 (10th Cir. BAP 2012).

The Trustee responds by arguing that this plain reading of § 362(k) does not prevent him from seeking a remedy under § 105(a) for the alleged stay violation and that his “request [in the second Amended Complaint] for ‘appropriate damages against Easy Credit’ without a specific reference to § 362(k), is clearly within the ambit of § 105(a).”²⁷

The Tenth Circuit BAP has held that the plain reading of § 362(h) “does not prevent business entities from seeking other bankruptcy remedies for stay violations.”²⁸ The Tenth Circuit has held that § 105(a) confers civil contempt powers on the bankruptcy court and these powers can be exercised for violations of the automatic stay.²⁹ This Court has sanctioned the use of § 105(a) for pursuing stay violations by an entity not authorized to seek the relief provided by § 362(k) for individuals.³⁰ Other bankruptcy courts in the Tenth Circuit have also recognized the remedy, but they caution that the remedies are not identical to those under § 362(k). An order under § 105 must be consistent with the purposes of civil contempt to either compel obedience with a court order or to compensate parties for losses resulting from the offending party’s non-compliance with a court order.³¹ “[C]ourts considering sanctions for stay violations under § 105(a) usually

²⁷ Dkt. 52, 5.

²⁸ *Rafter Seven Ranches L.P. v. WNL Invs., LLC (In re Rafter Seven Ranches L.P.)*, 414 B.R. 722, 733 (10th Cir. BAP 2009).

²⁹ *Mountain Am. Credit Union v. Skinner (In re Skinner)*, 917 F.2d 444, 447 (10th Cir. 1990).

³⁰ *In re Hassan*, Case No. 04-20332-7, 2010 WL 5348761, at *7 (Bankr. D. Kan. Dec. 21, 2010).

³¹ *Rushton v. Bank of Utah (In re C.W. Mining Co.)*, 465 B.R. 226, 235 (Bankr. D. Utah 2011), *aff’d In re C.W. Mining Co.*, 477 B.R. 176 (10th Cir. BAP 2012).

require that the violation be ‘willful.’”³² “A ‘willful violation’ does not require a specific intent to violate the automatic stay;” knowledge of the stay and intentional acts which violated the stay are sufficient.³³ However, even if a willful violation is shown, an award under § 105 is discretionary.³⁴

As a first step in analyzing the Trustee’s claim for an order of contempt, it is appropriate to consider whether there has been a stay violation. Easy Credit contends that it did not violate the stay when returning the second garnishment check to the Debtor’s employer. Easy Credit submits that it “has been unable to locate a single case supporting (or even mentioning) an argument that the return of garnished wages to a debtor post-petition, but pre-demand by the trustee, violates the automatic stay and subjects the creditor to damages under § 362 or for contempt under § 105(a).”³⁵ It argues that damages under § 362 are meant to discourage blatant refusal by a creditor to turnover property or a creditor’s passive retention of property of the estate and the Easy Credit did not engage in such conduct.

The Trustee urges that § 362’s prohibition of exercising control over property of the estate be read in conjunction with § 542, which requires an entity in possession,

³² *In re Rafter Seven Ranches L.P.*, 414 B.R. at 733.

³³ *Diviney v. Nationsbank of Texas, N.A. (In re Diviney)*, 225 B.R. 762, 774 (10th Cir. BAP 1998).

³⁴ *In re Rafter Seven Ranches L.P.*, 414 B.R. at 734; see *Los Alamos Nat’l Bank v. Potter (In re Potter)*, Case Nos. 7-05-14071 MS, 05-1149 M, 2007 WL 2332137, at *3 (Bankr. D.N.M. Aug. 13, 2007).

³⁵ Dkt. 78, 14.

custody, or control of property that the trustee may use to deliver it to the trustee.

According to the Trustee, this section is self actuating, and Easy Credit violated its duty when returning the garnishment check for the second pay period to Debtor's employer rather than to the Trustee.

The Court finds that there was no stay violation. The arguments of both Easy Credit and the Trustee equate return of the check to Debtor's employer with the turnover of wages. But Easy Credit returned a check drawn on the employer's account. A check is a draft, an order, payable on demand and drawn on a bank.³⁶ The employer's obligation to Easy Credit under the garnishment order would have been discharged by payment, if the check had been honored upon presentment for payment.³⁷ But the check was not presented; it was returned to the maker. Easy Credit did not return Debtor's nonexempt wages to the employer; it returned a check payable to Easy Credit to the maker. The Debtor's nonexempt wages remained unpaid.

Since the Court finds there was no violation of the stay, there is no basis for a finding of contempt under the Trustee's rationale. Further, if there was a willful violation of the stay, the Court would decline to find Easy Credit in contempt. It acted in a reasonable manner. Assuming a violation, both the potential and actual harm to estate is minimal. The small value involved does not justify either the attention and time which

³⁶ K.S.A. 84-3-104 (e) and (f).

³⁷ K.S.A. 84-3-602.

have been given to this matter or the costs incurred by both the estate and Easy Credit. To find Easy Credit in contempt would compound the lack of equity.³⁸

CONCLUSION.

For the foregoing reasons, the Court denies the relief requested by the Trustee against Easy Credit. The transfer of \$544.35 of Debtor's nonexempt prepetition wages to Easy Credit is within the *de minimis* exception to preferential transfers under § 547(c)(8). The Court declines to hold Easy Credit in contempt for allegedly violating the automatic stay by returning garnishment checks drawn by Debtor's employer after the bankruptcy was filed to the employer.

The foregoing constitute Findings of Fact and Conclusions of Law under Rule 7052 of the Federal Rules of Bankruptcy Procedure which makes Rule 52(a) of the Federal Rules of Civil Procedure applicable to this proceeding.

IT IS SO ORDERED.

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³⁸ Easy Credit's trial brief makes extensive argument in support of the position that the Trustee beached his § 704 duty to act in the best interest of the estate when pursuing Easy Credit and should therefore not be permitted to recover § 105 damages. The Court finds it can rule on the merits of the Trustee's § 105 claim without addressing this issue and therefore does not consider the matter.