**United States Bankruptcy Court**
**Western District of Wisconsin**

Cite as: [Unpublished]

**Alta J. Marshall, Plaintiff, v.**
**Government Employees Financial Corporations**
**and Subsidiaries, Defendant**
(In re Alta J. Marshall, Debtor)
Bankruptcy Case No. 94-32402-7; Adv. Case No. 94-3147-7

United States Bankruptcy Court
W.D. Wisconsin

February 24, 1995

Michael J. Rynes, Bankruptcy Law Services, Madison, WI, for plaintiff.
Gregory C. Collins, Axley Brynelson, Madison, WI, for defendant.

Robert D. Martin, United States Bankruptcy Judge.

**MEMORANDUM DECISION**

Alta Marshall ("Marshall") filed under chapter 7 on September 7, 1994. At the time of filing, her wages were subject to continuous garnishment by the Government Employees Financial Corporation ("GEFCO"). The garnishment summons and complaint were served on January 6, 1994. Marshall did not answer. Thereafter, her wages were garnished.(1) From July 7, 1994 until she filed bankruptcy, $853.15 was garnished from Marshall's wages.(2) Marshall seeks to recover the wages garnished after July 7 as preferential transfers to GEFCO under 11 USC § 547(b) (1994) and 11 USC § 522(h) (1994).(3)

We are asked to decide whether, on the facts of this case, a continuing wage garnishment uncontested by the debtor prior to the preference period which caught wages earned within the period, may be avoided under § 547(b). The answer is yes. However, in order for Marshall to recover in this adversary proceeding, she must satisfy the remaining requirements of § 522(h). See Matter of Rutty, 39 BR 204, 206 (Bankr SDNY 1984). Because she has not satisfied these requirements, Marshall cannot recover the garnished wages.

Essential to recovering a preference is a showing that the transfer involved an interest of the debtor. 11 USC § 547(b) (1994); see also Matter of Smith, 966 F2d 1527, 1529 (7th Cir 1992). A transfer does not take place until the debtor first acquires rights in the property. 11 USC § 547(e)(3) (1994). GEFCO argues that Marshall's interest in future wages was transferred by service of the garnishment summons. Marshall argues she did not acquire an interest in the wages until she completed her work and therefore, her interest was transferred within 90 days of her bankruptcy.

Whether a debtor has an interest in garnished funds is an issue of state law. Barnhill v Johnson, 112 S Ct 1386 (1992); Matter of Coppie, 728 F2d 951, 952 (7th Cir 1984). GEFCO's lien was perfected when Marshall's right to contest the action expired and the

perfection relates back to the date of service, January 6, 1994. See Elliot v Regan, 274 Wis 298, 302 (1956). GEFCO contends that by the time the employer was obligated to pay the garnished wages, the debtor no longer had an interest in them.

GEFCO looks to Matter of Woodman, 8 BR 686 (Bankr WD Wis 1981) for support of its contention. Woodman was decided under a prior statute which did not permit continuing garnishment of wages paid by private employers. In Woodman, the debtor attempted to recover funds caught in two separate wage garnishments. The employer was served a garnishment summons and complaint for each prior to the preference period. The wages sought were also earned prior to the preference period. However, the employer paid the funds caught to the court within the preference period. The debtor argued that the funds were transferred within the preference period and that those transfers were therefore avoidable. The court disagreed. "Once the garnishee employer became liable to turn the property over to the court, the transfer of the debtor's property was complete and perfected and the [debtor] no longer had an interest in the property." Id at 688. The employer became liable when it held property belonging to the debtor and the debtor failed to answer the garnishment complaint. The debtor's interest was thus extinguished prior to the preference period. Therefore, the transfer from the employer to the court was not a preference.

Marshall is subject to a continuing garnishment. No claim has been made to recover garnished wages earned prior to the preference period as was the case in Woodman. At the time of service, Marshall had not yet earned the wages which are in dispute. A debtor does not have an interest in unearned wages. In re Krumpe, 60 BR 575, 577 (Bankr D Md 1986). "When there is a continuing garnishment . . . [the] lien arises when the debtor acquires rights in the property transferred." In re Passmore, 156 BR 595, 598 (Bankr ED Wis 1993). Marshall's employer was not liable until the wages were earned. See In re Cox, 10 BR 268, 270 (Bankr D Md 1981). Marshall earned the wages during the preference period. That is when her interest arose. It was that interest which was transferred by the garnishment and subsequently transferred by the employer to the court pursuant to the garnishment summons. Because neither of the transfers could take place before Marshall's interest came into being, each occurred within the preference period and is avoidable.

This result is not in conflict with Matter of Coppie, 728 F2d 951 (7th Cir 1984). In Coppie, the court held that, under Indiana law, garnishment of a debtor's wages within the 90 day preference period pursuant to an order issued prior to the 90 day period was not a preference. While the service of a garnishment summons and complaint created a continuing lien, service did not extinguish the debtor's interests. In re Weatherspoon, 101 BR 533, 539 (Bankr ND Ill 1989). Rather, the issuance of a separate garnishment order extinguished the debtor's interests. "Following court orders that the liens on these debtor's future income be continuous, the debtors no longer had a property interest in 10% of their future salaries." Coppie, 728 F2d at 952-53. Under Indiana law, the employer became liable to the creditor for 10% of the debtor's salary at the time the order was entered. However, in Marshall's case, no such order was entered. In order for the Coppie analysis to be applicable, the service of the garnishment summons and complaint must operate to make an employer liable to the garnishing creditor for future wages, thereby divesting the debtor of her interest.

Future wages are contingent debts which an employer owes to an employee. Olson v Stone, 573 P2d 98, 100 (Colo 1977). They depend upon an employee's future fulfillment of the employment "contract." Under Wis Stat § 812.19(4) (1991-92), an employer is not liable to a garnishing creditor for contingent debts.[(4)] See Winnebago Homes, Inc. v Sheldon, 29 Wis 2d 692, 702 (1966). Garnishment statutes must be strictly construed. Mahrle v Engle, 261 Wis 485, 488 (1952); Milwaukee Stove v Apex

Heating, 142 Wis 2d 151, 155 (Wis App 1987). Thus, in Marshall's case, at the time of service Marshall's employer was not liable to GEFCO for future, contingent wages. Rather, it became liable when the wages were earned. As held in Passmore, when the debtor is subject to a continuing lien, the lien does not arise until the wages are first earned. This is consistent with a great number of courts which have considered the issue. See, e.g. In re Castleton, 84 BR 743 (Bankr D Colo 1988); In re Holdway, 83 BR 510 (Bankr ED Tenn 1988); In re Harrington, 70 BR 301 (Bankr SD Fla 1987); In re Dunn, 56 BR 275 (Bankr MD La 1985); In re Perry, 48 BR 591 (Bankr MD Tenn 1985).

While the transfers may have been preferential, § 547(b) authorizes a trustee, not the debtor, to avoid preferences. See 11 USC § 547(b) (1994). A debtor may exercise the trustee's avoiding powers under limited circumstances. In re Fabian, 122 BR 678, 681 (Bankr WD Pa 1990). Under § 522(h), a debtor may utilize the trustee's avoiding powers provided that five requirements are satisfied. In re Humphrey, 165 BR 578, 580 (Bankr D Md 1993). The debtor must show that: (1) she could exempt the property which is the subject of the action, (2) the transfer would have been avoidable, (3) the trustee has not attempted to avoid the transfer, (4) the transfer was involuntary, and (5) the property was not concealed by the debtor. See In re Klingbeil, 119 BR 178, 181 (Bankr D Minn 1990); 11 USC § 522(h), (g)(1) (1994).

Marshall has satisfied the second, fourth and fifth elements, but not the first or third. Marshall's complaint does not include any allegation that the garnished wages are exempt. Nor have the wages been claimed exempt. Although in this district, schedules can be liberally amended to claim exemptions,[(5)] the failure to plead eligibility for the exemption is fatal to this adversary proceeding in the absence of any evidence, admissions, or proofs on the issue. Cases holding that a debtor has standing to pursue a preference action have found that the debtor has either scheduled the property subject to the action exempt or provided some proof that the property is exempt. Sections 522(h) and (g)(1) so require. See, e.g. Klingbeil, 119 BR at 181-82; In re Shorts, 63 BR 2 (Bankr DC 1985); Cox, 10 BR at 272.

More important even than the right to an exemption for recovery under § 522(h) is a debtor's proof that the trustee has not attempted to pursue avoidance of the transfer. Because there is no allegation of this element, there can be no admission by the defendant's failure to contest the issue. Furthermore, the absence of any evidence on the issue precludes conforming the pleadings to proofs.

The court cannot be left to guess as to the factual basis for a claim. Even when, as is true in this case, there seems to be no reason to doubt that the facts, if alleged and proved, would support an outcome, the court cannot engage in conjecture.

Upon these findings and conclusions, an order may be entered denying the debtor recovery of the garnished wages.

**END NOTES:**

1. Wis Stat § 812.18(1)(a) (1994) provides:

From the time of service upon the garnishee, the garnishee shall be liable to the creditor for the property then in garnishee's possession or under his control belonging to the debtor or in which the debtor is interested to the extent of his or her right or interest therein and for all the garnishee's debts due or to become due to the debtor . . .

Although the duration of an earnings garnishment is now specified in Wis Stats § 812.35 and § 812.40, the new specifications did not come into effect until after Marshall's garnishment began.

2. The following transactions are at issue:

| Date of Garnishment | Pay Period | Amount |
|---|---|---|
| 07/07/94 | 06/13-06/24/94 | $163.65 |
| 07/21/94 | 06/27-07/08/94 | $163.53 |
| 08/04/94 | 07/11-07/11/94 | $174.54 |
| 08/18/94 | 07/25-08/05/94 | $148.19 |
| 09/01/94 | 08/08-08/19/94 | $203.36 |
| Total Amount | | $853.39 |

3. Section 522(h) provides:

The debtor may avoid a transfer of property of the debtor or recover a setoff to the extent that the debtor could have exempted such property under subsection (g)(1) of this section if the trustee had avoided such transfer, if--

(1) such transfer is avoidable by the trustee under section 544, 545, 547, 548, 549, or 724(a) of this title or recoverable by the trustee under section 553 of this title; and

(2) the trustee does not attempt to avoid such transfer.

Section 522(g)(1) provides:

Notwithstanding sections 550 and 551 of this title, the debtor may exempt under subsection (b) of this section property that the trustee recovers under section 510(c)(2), 542, 543, 550, 551, or 553 of this title, to the extent that the debtor could have exempted such property under subsection (b) of this section if such property had not been transferred, if--

(1)(A) such transfer was not a voluntary transfer of such property by the debtor; and

(B) the debtor did not conceal such property.

4. Specifically, the section provides:

No person shall be liable as garnishee: . . .

(4) By reason of any thing owing by him upon a contingency.

5. Exemption statutes are to be construed liberally or in favor of permitting debtors the greater benefit of the exemptions. See In re Erickson, 63 BR 632, 632 (WD Wis 1986) aff'd, 815 F2d 1090 (7th Cir 1987). Thus, a debtor's exemption schedule may be amended at any time until the case is closed. See FRBP 1009; Matter of Hill, 972 F2d 116 (5th Cir 1992).