11 U.S.C. § 549(b)
11 U.S.C. § 362
Transfer
Assignment

IN RE MARTIN Civil No. 94-6496-HO

9/8/95 D. Or. Judge Hogan affirming Judge Hidgon

On January 19, 1992 debtors entered into a loan agreement with bank authorizing bank to receive a deposit of their tax refund and to deduct the balanced owed under the loan agreement. On the same day the debtors authorized the IRS to deposit their refund in the account. The debtors filed their Chapter 7 petition on January 29. On January 31 debtors' tax refund was deposited in the account by electronic transfer. The bank deducted the balanced due under the loan agreement. The trustee sought to avoid the bank's taking of the tax refund on the ground that it was a post-petition transfer for an antecedent debt in violation of § 549(b), and that the setoff violated the automatic stay of § 362. The district court upheld the bankruptcy court's finding that the tax refund was not property of the estate at the time of filing because it had previously been equitably assigned to the bank. The right to payment was a "chose in action" distinguishable from the rights given by the holder of a check, because debtors here had given up any right to control funds deposited to their account. Nor was the right to a tax refund so personal as to preclude assignability, because it arises out of a property interest rather than a personal injury. The parties' actions and writings were sufficient to create an assignment, and it was not necessary for the funds to actually have been received prior to the filing of the petition.

P95-17(8)

~ c-Sticka, Trust
FILED 9-8-95

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

In re KENNETH D. MARTIN, KATHLEEN A. MARTIN, Debtors.	Civil No. 94-6496-HO ORDER
RONALD R. STICKA, Trustee for Estate of Kenneth D. Martin and Kathleen A. Martin, Appellant/Plaintiff, v. MELLON BANK (DE) NATIONAL ASSOCIATION, Appellee/Defendant.	

This is a bankruptcy appeal arising out of the debtors obtaining a tax refund anticipation loan (RAL) prior to the filing of their bankruptcy petition on January 29, 1992. On January 18, 1992, the debtors electronically filed their 1991 federal income tax return through H & R Block's ("Block") RAL program. That same day, the debtors executed a "Rapid Refund

Request and Supplemental Loan Agreement" ("loan agreement"), authorizing appellee, Mellon Bank ("bank") to establish a deposit account in the debtors' names to receive a direct deposit of the 1991 tax refund and to deduct the balance owed under the loan agreement. On January 19, 1992, the bank accepted the loan agreement and opened the deposit account ("account"). The debtors also completed IRS Form 8453, authorizing the IRS to deposit their 1991 tax refund in the account. On January 21, 1992, the bank paid debtors $1,678 and Block $35.00, pursuant to the terms of the loan agreement. The bank's fee for the transaction was $29.00. The debtors' total obligation under the loan agreement was $1,742, the amount of the debtors' anticipated tax refund. The debtors filed their Chapter 7 petition for bankruptcy on January 29, 1992. At that time, there were no funds in the account. On January 31, 1992, the tax refund of $1,742 was deposited in the account by electronic transfer. The $1,742 balance due under the loan agreement was deducted from the account, and the account was closed.

In the bankruptcy proceeding, the trustee sought to avoid the bank's taking of the debtors' federal tax refund on the ground that it was a post-petition transfer for an antecedent debt in violation of 11 U.S.C. §549(b), and that the setoff violated the automatic stay provisions under 11 U.S.C. §362. The bankruptcy judge found that the debtors' 1991 federal tax

refund was not property of the estate at the time of filing the petition, because it had previously been equitably assigned to the bank and, alternatively, the bank held an unperfected security interest which defeated the rights of the trustee. The trustee appeals the rulings on both of these issues.

DISCUSSION

The bankruptcy judge premised her decision on the finding that the debtors' right to a tax refund was a "chose in action," which they assigned to the bank in a prepetition equitable assignment. The trustee argues, however, that a valid assignment could not be completed before the funds were deposited by electronic transmission into the debtors' account at the bank. Because the actual deposit occurred after the filing of the bankruptcy petition, the trustee reasons that this was a post-petition transfer in violation of 11 U.S.C. §549.

"Transfer" is generally defined in the Bankruptcy Code as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with . . . an interest in property. . . ." 11 U.S.C. §101(54). The trustee relies on Barnhill v. Johnson, 503 U.S. 393 (1992) to support the theory of the absence of a prepetition transfer. The issue in Barnhill was whether a prepetition delivery of a debtor's check was a voidable preference under 11 U.S.C. §547(b). The Supreme Court specifically considered whether the recipient of a check had a "chose in action" or a conditional

right to property of the debtor. The Court found that a transfer for preference purposes involving a payment by check occurs on the date the bank honors the check, stating in relevant part:

> But at most, what petitioner gained was a chose in action against the debtor. Such a right, however, cannot fairly be characterized as a conditional right to 'property or an interest in property,'. . . where the property in this case is the account maintained with the drawee bank. For as noted above, until the moment of honor the debtor retains full control over disposition of the account and the account remains subject to a variety of actions by third parties. Id. at 400-01.

The trustee argues that the reasoning in Barnhill concerning timing of the transfer applies to an evaluation of the prepetition assignment, because up to the time of filing the bankruptcy petition: (1) Only the debtors could have accessed the U.S. Treasury for the 1992 tax refund, and (2) The government could have exercised rights of setoff or seizure, such as payment on a student loan, or delinquent child support payments. See 26 U.S.C. §6402; Treas. Reg. §301.6402-3(a)(6). In other words, at the moment of bankruptcy, no transfer had yet occurred, and the bank held nothing more that the expectation of future payment on its loan with the debtors.

It is noteworthy that the Supreme Court in Barnhill expressly limited the scope of its holding by stating "[f]or purposes of payment by ordinary check, therefore, a 'transfer' as defined by §101(54) occurs on the date of honor, and not before." Barnhill, 503 U.S. at 400. In addition, there are critical factual distinctions. In this action, it is undisputed

that the debtors' account was established with the intention that they would have no access to or withdrawal rights. (Excerpt of Record (#54) at 30, Stipulation of Facts; and at 70, Supplemental Stipulation of Facts). The debtors gave up all interest in and control over the account at the time of receiving their RAL.

It is also undisputed that the debtors were asked, as a part of the RAL application, whether they owed any taxes from prior years, any delinquent child support and/or alimony payments, or any delinquent federally sponsored loans. They were asked whether they had previously filed a 1991 federal income tax return, whether they had filed or anticipated filing a bankruptcy petition, whether they had paid any estimated tax or had any amount of a 1990 refund applied to the 1991 tax return. The debtors responded negatively to each of these questions. Id. at 30. Block received authorization from the IRS to make an electronic filing, as well as verification that the IRS held no liens against the debtors' anticipated refund. Id. The timing of transfer discussion in Barnhill does not apply to this transaction.

I concur with the bankruptcy judge's analysis that, under Oregon law, there may be an equitable assignment of an expectant, possible, or contingent property interest which may ripen into a future right. As applied here, it is not necessary that the funds be deposited in the account before there can be

a valid assignment. The trustee argues that even if the debtors' right to a tax refund is properly characterized as a chose in action, it could not be assigned as a matter of law because it was a personal right which will not survive them. The trustee relies on the fact that the IRS will not issue checks to designated assignees and will not become involved in loan transactions to support the "personal rights" theory. However, choses in action "arising ex delicto from injury to one's property, as distinguished from one's person are generally assignable." Farris v. U.S. Fidelity and Guaranty Co., 284 Or. 453, 587 P.2d 1015, 1026 (1978)(en banc)(Lent, J., dissenting). "Any claim which affects the estate of a party, although arising out of tort, may be assigned; but the rule is otherwise where it arises out of an injury to the person. . . ." Id., quoting Rorvik v. North Pac. Lumber Co., 99 Or. 58, 195 P. 163, 167 (1921). The Oregon Supreme Court has stated that "[t]he test of assignability of a right is whether the right survives. . .and personal rights do not survive." Nordling v. Johnston, 283 P.2d 994, 1000 (Or. 1955)(citations omitted). In Nordling, the court cited these examples of unassignable rights: actions for slander, assault, and battery and other "pure torts." Id.

In this action, the fact that the IRS will not become involved in assignments and loan transactions does not necessarily mean that the nature of the right to a tax refund is sufficiently personal to preclude assignability. The debtors'

right to a refund arises out of a property interest rather than a personal injury, and assignability is, therefore, not precluded under a personal rights theory.

The next issue is whether the debtors' entitlement to the tax refund had already been transferred as of January 29, 1992 due to a prepetition equitable assignment. Not every transfer of an interest is an assignment. I concur with the bankruptcy judge's analysis of Oregon law concerning the creation of an assignment. Martin v. Mellon Bank (De) Nat'l Assoc., 167 B.R. 609 (D. Or. 1994). Pursuant to this analysis, an assignment may be in the form of a letter, settlement agreement, or promissory note, and need not contain the word "assignment." See In re Freeman, 489 F.2d 431 (9th Cir. 1973); Wittmayer v. Edwards, 781 P.2d 866 (Or. App. 1989); Wakefield v. Parkhurst, 84 Or. 483, 165 P. 578 (1917); In re Ashford, 73 B.R. 37 (Bkrtcy. N.D. Texas 1987). Generally, any writing or act, "if communicated to the holder of the fund, directing his debtor to transfer to a named person any portion or all of the particular funds in his possession, operates as an equitable assignment of the fund designated." In re Ashford, 73 B.R. at 39. An assignee of a debtor's interest in a tax refund to be paid in the future defeats the bankruptcy trustee's claims to that refund. In re Freeman, 489 F.2d 431 (9th Cir. 1973). It is also noteworthy that one bankruptcy court has held that at the time of executing RAL documents, debtors effectively assign repayment to the bank

and a "transfer" occurs pursuant to 11 U.S.C. §101(54). Swartz v. H & R Block, 119 B.R. 219 (D. Idaho 1990). I concur with the bankruptcy judge's interpretation of the parties' contract and the finding of an equitable assignment prior to the filing of the bankruptcy petition. It is not necessary for this court to reach the issues of constructive trust or security interest.

CONCLUSION

The bankruptcy judge's decision to grant the bank's motion for summary judgment and deny the trustee's motion for summary judgment is affirmed.

DATED this 8th day of September, 1995.

Michael R. Hogan
UNITED STATES DISTRICT JUDGE