UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

In Re:

Case No. 06-11697

DARYL DECORA

Debtor.

PETER F. HERRELL
In Re: Daryl DeCora

Adversary Case No. 07-111

Plaintiff

v.

DARYL DECORA
W8949 Elk Circle
Black River Fall, WI 54615

HO-CAK FEDERAL
a division of Citizen's Community Federal
W9036 Hwy 54 East
Black River Falls, WI 54615

Defendants.

BRIEF OF PLAINTIFF-TRUSTEE

Facts:

The Trustee and Ho-Chunk Federal Bank (hereafter "HCFB") has or will shortly file a stipulation of the facts. Those facts will be referred to in the discussion below, but will not be restated here.

Discussion:

Trustee raised two claims against HCFB. The first claim alleges that under 11 U.S.C. Sec. 544 the "irrevocable partial assignment of right to payments (default)" is in fact an unperfected security interest which can be avoided and which will give the Bankruptcy Estate certain relief as set forth in the second cause of action.

It is not disputed that HCFB failed to properly file a financing statement. The nature of the per capita payments at issue have been discussed by this Court in its widely cited Kedrowski decision, 284 BR 439 (BCWD Wis. 2002). In that decision this Court referred to Johnson v. Cottonport Bank, 259 BR 125(WD La. 2000.) In that case, the Court ruled that Cottonport Bank (hereafter "Bank") did have a perfected security interest in the per capita payments, so that they could continue to receive both pre-petition and post-petition payments. This case is an example of where a bank handled the situation correctly. They took a security agreement, in amongst other things, the per capita payments, and they perfected it by filing the requisite financing statement. See Johnson at 129. The Court ruled that the per capita payments were sums the Debtor received from the Tribe as proceeds of the right to receive them. At footnote 4, the Johnson Court discussed a significant distinction between that case and this Decora case, pointing out that in Johnson the Debtor used "the per capita payments to pay the debt rather than simply to secure it should he be unable to pay it by other means. In an assignment, an assignee has a complete and present right to future payments and this interest survives a bankruptcy." In our case we do not have a full assignment, but as stated in the caption and as it is clear from the body, this is a partial assignment that goes into effect only upon default. This is not the complete assignment discussed in Johnson. Instead, the partial default assignment is in fact another type of security agreement. As a type of security agreement, it was required to be perfected, which it was not. If a transaction is a grant of a security interest or a mere assignment for security, the transaction is within Chapter 409, and the automatic perfection provisions of 409.309 do not apply. White and Summers (5th Ed.) Sec. 31-7, page 144.

The better analogy here is to the other security that HCFB had, the Debtor's automobile, in which it took a security agreement, which is attached to the Stipulation of Facts and perfected the same with the Department of Motor Vehicles. It is also noteworthy that both of the security agreements attached to the Stipulation of Facts make reference to a security interest being given in the "per cap."

More significantly, however, there is a Bankruptcy Code provision that impacts this matter, whether or not HCFB is perfected. 11 U.S.C. Sec. 552(a) provides that property acquired by the Estate after commencement of the case, is not subject to any

lien resulting from any security agreement entered into by the Debtor before commencement of the case. There is an exception to this rule in (b)(1) that it generally applies to the proceeds, profits, offspring and property of collateral existing prior to the commencement. To the extent Johnson v. Cottenwood, supra held otherwise, the Trustee disagrees. Also see Norton Bankrutpcy Law and Practice, Sec. 62:2 in support of the argument that 11 U.S.C. Sec. 552(a) cuts off, so to speak, any pre-petition security interest in post-petition property. In any event, the Court also has the power under Sec. 552(b) to cut off any post-petition reach of the security interest. The Court should do so in this case.

The second claim against HCFB asked first of all that any payments made during the 90 day period, prior to the filing of the petition be found to be a preference and be ordered to be turned over to the Estate.

The Stipulation between the Estate and HCFB indicates no payments made during this 90 day period. If the Estate is misinformed, Trustee invites HCFB's counsel to correct the record. If there are no payments in the prior 90 day period, there is no preference to be recovered.

The second part of the second cause of action asks to invalidate under 11 U.S.C. Sec. 549(a) all transfers of property of the Estate that occur after commencement of the case. This Court's Kedrowski decision has established that the per capita payments are property of the Estate. Sec. 549(a)(1) allows Trustee to avoid transfers of their property that occur after commencement of the case. The Stipulation between the parties indicates that since commencement of the case, including monies received on the day of filing, HCFB has received $9,984.16. Under Sec. 549 these transfers may be avoided and recovered to benefit all of the creditors.

Finally, Plaintiff anticipates that HCFB will argue that none of this makes any difference because after they are paid monies can flow to the Bankrutpcy Estate either from the Debtor or from the Tribe to pay the balance of the creditors. There are several problems with this argument. First of all, this Debtor appears, from a review of the docket, to have forfeited his discharge by failing to attend the financial management course. Since the whole purpose for filing a Chapter 7 is to get a discharge, Trustee is very limited in his ability to take action against the Debtor to collect these monies.

Secondly, the Tribe routinely takes a position that it is not subject to the Bankrutpcy Court's jurisdiction. While this may not be the case, Trustee has every reason to expect the Tribe will not be cooperative in paying over the proceeds to the Trustee for distribution to the other creditors. However, HCFB is in the unique position to pay both its debt and the unsecured claims. As can be seen by reviewing the Tribal Ordinances, attached to the Stipulation, HCFB holds a special position with the Tribe. The easiest and most efficient way to obtain a payment for all involved is for the monies to first of all pass through HCFB to the Bankruptcy Estate until the claims and administrative expenses are paid in full, with the per capita payments then going to HCFB to pay its debt. As the Stipulation of Facts indicates, this is not going to be a substantial amount, seeing as HCFB is receiving insurance proceeds and perhaps additional insurance to pay off the automobile loan. The other claim, claim no. 2, was relatively small, i.e. $3,593.08.

Conclusion:

HCFB took a security interest in the per capita payments from the Ho Chunk Nation to the Debtor, which it failed to perfect. As a result of this, the Bankrutpcy Estate, as a matter of well established law, is entitled to: 1. A decision avoiding the security interest of HCFB; 2. To the extent there were any payments made to HCFB in the 90 days prior, these payments paid over to the Estate; 3. For an Order directing HCFB to pay all post-petition payments received from the Tribe paid over to the Bankruptcy Estate; and 4. Ordering HCFB to pay over any other future payments it receives to the Bankruptcy Estate until the claims and administrative expenses of the Estate are paid in full.

Respectfully submitted.

Dated this 16th day of November, 2007.

_____*/s/ Peter F. Herrell*_____
Peter F. Herrell
Attorney for Trustee/Plaintiff