

**In the United States Bankruptcy Court**  
**for the**  
**Southern District of Georgia**  
**Savannah Division**

In the matter of: )  
) )  
**JAMES WILLIAM DONNELLY** )  
(Chapter 7 Case 98-43608) )  
) )  
*Debtor* )  
) )  
**WILEY A. WASDEN, III** )  
Chapter 7 Trustee )  
) )  
*Plaintiff* )  
) )  
v. )  
) )  
**DAVID CHRISTIAN** )  
) )  
*Defendant* )

Adversary Proceeding

Number 99-4106

**FILED**  
at 11 O'clock & 55 min AM  
Date 11/3/99

MICHAEL F. McHUGH, CLERK  
United States Bankruptcy Court  
Savannah, Georgia



**MEMORANDUM AND ORDER**

The above-styled case came before this Court for trial on September 29, 1999. The Chapter 7 Trustee, Wiley A. Wasden, III, sought turnover of \$1,000.00 that the Debtor, James William Donnelly, had paid the Defendant, David Christian. This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157(b)(2)(F). Pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure, I make the following Findings of Fact and Conclusions of Law.

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FINDINGS OF FACT

The Debtor in the Chapter 7 proceeding, James William Donnelly, entered into a loan agreement on January 5, 1998, with the Defendant in this Adversary Proceeding, David Christian. The terms of that handwritten loan agreement are as follows:

1/5/98

I James Donnelly Agree to Pay David Christian \$6000.00 Six Thousand Dollars on Feb 19<sup>th</sup> 1998 in return for 5000.00 Five Thousand Dollars on Jan 5<sup>th</sup> 1998 to Purchase Antiques for Feb 16<sup>th</sup> Auction.

James Donnelly

(Doc. 16-A). The Defendant also presented a typed version of the agreement, also dated January 5, 1998, signed by Debtor Donnelly. That agreement reads as follows:

January 5, 1998

Received from David M. Christian:

The Sum of \$5,000.00 (Five Thousand) Dollars in Cash

For The Purpose Of:

Loan -- To Be Repaid According to Terms as Follows:  
Full Amount (\$5,000.00 Plus Additional \$1,000.00 (Total of \$6,000.00) To Be Repaid, In Full, In Cash, on February 19, 1998.

No Other Terms Implied Or Agreed To Herewith.

Above Monies Received and Terms Agreed To By:

Jim Donnelly (signature) Jan. 5, 1998, 9:00 A.M.

(Doc. 16-B). At the time this agreement was entered into, Debtor tendered a check to Mr. Christian, from the account of his wife, Pamela Donnelly in the amount of six thousand dollars, which was later returned due to insufficient funds. (Doc. 16-C). Debtor defaulted on this loan and later entered into another agreement with Christian in which he was given the option to either pay the loan on July 2, 1998 with a penalty of \$1,500.00 or pay the loan on September 25, 1998 with a penalty of \$3,000.00 added to the original debt. Each option provided for a minimum payment to be made at some point in July. This Document was notarized on July 2, 1998 in Chatham County. (Doc. 16-D).

Debtor chose the second option, repaying the loan on or before September 25, 1998 with a penalty of \$3,000.00 to be added to the original \$6,000.00 bringing the total due to \$9,000.00 with a \$500.00 payment to be made on July 2, 1998 and subsequent minimum payments of \$500.00 to be made on the following dates: July 17, July 31, August 14, August 28, and September 11, 1998. (Doc. 16-D). Debtor subsequently issued three checks to Christian, one on August 20, 1998 for the amount of \$500.00, one on August 31, 1998 for the amount of \$500.00, and finally, one on September 11, 1998, also for \$500.00. (Plaintiff's Exhibit 1). Debtor filed a Chapter 7 bankruptcy petition on November 25, 1998.

The Trustee, in bringing this adversary proceeding, seeks to recover the payments made to Christian by Debtor in the 90 day period before the filing of the petition -

specifically the checks dated August 31 and September 11, constituting a total of \$1000.00 as voidable preference payments under 11 U.S.C. § 547. Defendant argues that the payments were made in the ordinary course of business, an exception found in 11 U.S.C. § 547, which would allow him to keep the payments made to him by the Debtor.

#### CONCLUSIONS OF LAW

11 U.S.C. § 547 provides that the trustee may avoid any transfer of an interest of the debtor in property

- (1) to or for the benefit of the creditor;
- (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
- (3) made while the debtor was insolvent;
- (4) made-
  - (A) on or within 90 days before the date of the filing of the petition . . .
- (5) that enables such creditor to receive more than such creditor would receive if-
  - (A) the case were a case under chapter 7 of this title;
  - (B) the transfer had not been made; and
  - (C) such creditor received payment of such debt to the extent provided by the provisions of this title

11 U.S.C. § 547 (b). At trial, neither party disputed the fact that two payments, the August 31 and September 11 payments, were made during the preference period from the account of Debtor James Donnelly, that the payments were on an antecedent debt, or that the Debtor was insolvent on the date of payment. All the elements of a voidable preference are thus established.

Voidable preferences made August 31 and September 11 may be not be avoided by the Trustee, however, if it is proven that they were:

(A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;

(B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and

(C) made according to ordinary business terms;

11 U.S.C. § 547 (c)(2). A creditor attempting to satisfy Section 547(c)(2) must prove all three elements of that subsection. Ellenberg v. Plaid Enterprises, 173 B.R. 790, 795 (N.D.Ga. 1993).

As to the first of these elements, that the debt be incurred in the ordinary course of business or financial affairs of the debtor and the transferee, there is no evidence present in the record that indicates that either the Defendant, David Christian, or the Debtor, Jim Donnelly, were engaged in the business of making loans. Assuming arguendo, however, that the Defendant and the Debtor were in the business of making loans, the elements presented in Section 547(c)(2)(B) and (C) are

nonetheless not met in this case, precluding the defense.

Section 547(c)(2)(B) requires that the Court make a subjective inquiry into whether the payment of a debt was made in the ordinary course of business of the debtor and the transferee. Ellenberg v. Plaid Enterprises, 173 B.R. at 795. Factors considered in this inquiry include the prior course of dealing between the parties, the amount of the payment, the timing of the payment, and the circumstances surrounding the payment. Id. at 795. The payments in question were made on August 31 and September 11, during the applicable preference period, and each amounted to \$500.00. The record does not indicate that a prior course of dealings exists between the Defendant and the Debtor which would establish a relationship in which the Defendant regularly makes loans to the Debtor. Nor is there any evidence that the Debtor, after obtaining a loan from the Defendant, has a history of re-paying the loan late and in terms that differ substantially from the original agreement. The evidence presented at the adversary trial and in the record, therefore, is not sufficient for this Court to find that the payments to David Christian made on August 31 and September 11 qualify as payments made in the ordinary course of business.

In order to determine if the requirements of Section 547(c)(2)(C) are met, this Court must make an objective inquiry into determining if the payments made on August 31 and September 11 were made according to ordinary business terms. Ellenberg v. Plaid Enterprises at 798. This inquiry requires proof that the payments made are ordinary in relation to prevailing

industry standards. Id. As stated before, the Defendant offered no evidence into the record to establish that he was in the business of making loans and that the payments on August 31 and September 11 were made according to ordinary terms found in such a business.

As there was no proof meeting the elements set forth in Section 547(c)(2), I hold that the payments made on August 31 and September 11 totaling \$1,000.00 be turned over to the Trustee and added to Debtor James William Donnelly's estate.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER of this Court that judgment be entered in favor of the Trustee against Defendant in the amount of \$1,000.00.



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Lamar W. Davis, Jr.  
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 2nd day of November, 1999.