

IN THE UNITED STATES BANKRUPTCY COURT

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FOR THE DISTRICT OF UTAH

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In re)	Bankruptcy Case No. 82C-01948
)	
EVERETT JOHNSON)	
BEATRICE L. JOHNSON)	
dba Peppermint Parlor,)	
)	
Debtors.)	MEMORANDUM DECISION

In the debtors' Chapter 13 plan, creditors George W. and JoKeith Hayes (Hayes) were listed and provided for as unsecured creditors. Subsequently, Hayes filed a proof of claim as a secured creditor. The debtors filed a motion to disallow Hayes' claim on the grounds that the security interest was never perfected and therefore Hayes was relegated to the status of an unsecured creditor. A hearing on said motion was had January 18, 1983, at which time Hayes raised the argument that even though he had not perfected his interest under state law, the facts and circumstances of this case entitled him to invoke the equitable lien theory to establish his priority as a secured creditor. The Court heard oral argument and considered briefs submitted by counsel. However, before considering the equitable lien question, the Court must resolve the threshold issue of whether a Chapter 13 debtor may invoke the avoiding powers of 11 U.S.C. § 544.

Section 544, the so-called "strong arm clause," gives to the trustee the power to avoid transfers of property of the debtor

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which are voidable by a judicial lien creditor, unsatisfied execution creditor, or a bona fide purchaser of real property. The provisions of Chapter 5 of the Code apply in Chapter 13 cases. 11 U.S.C. § 103(a). Accordingly, a Chapter 13 trustee has all of the powers enumerated in § 544.

However, in this case it is not the trustee who seeks to exercise the avoiding power but the debtor. There is no basis in the Code for such an action. Section 1303 lists the rights and powers of the debtor, exclusive of the trustee, which include various provisions of § 363 concerning the use, sale and lease of property. In addition, where the debtor is engaged in business, § 1304 gives to the debtor rights and powers as provided in §§ 363(c) and 364. Nowhere is a Chapter 13 debtor given the powers accorded a trustee in Chapter 5. In contrast, a Chapter 11 debtor in possession is specifically granted such power by virtue of § 1107(a). Had Congress intended Chapter 13 debtors to exercise avoiding powers, it would have been a simple matter to include a section in Chapter 13 analagous to § 1107(a). To imply that Chapter 13 debtors are entitled to the trustee's rights and powers as enumerated in Chapter 5 does violence to the rules of statutory construction. In re Carter, 1 CBC 2d 381 (D. Colo., 1980).

Based upon the above analysis, the Court concludes that a Chapter 13 debtor has no "strong arm" power under the Code and the debtor may not attack the validity of the transfer of the

security interest to Hayes. It is therefore not necessary to address the question of whether Hayes is entitled to an equitable lien. Accordingly,

IT IS HEREBY ORDERED that the debtors' motion to disallow Hayes' secured claim is denied.

DATED this 27 day of April, 1983.

BY THE COURT:



GLEN E. CLARK
UNITED STATES BANKRUPTCY JUDGE