IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE:	)	Chapter 7
	)	
KATRINA S. MORROW	)	Case No. 04-10909 (MFW)
Debtor	)	
	)	
KATRINA S. MORROW	)	
Plaintiff	)	Adv. No. 04-53366 (MFW)
	)	
vs.	)	
	)	
DOW FINANCE CORP.,	)	
Defendant	)	

MEMORANDUM OPINION[1]

Before the Court is the Motion of DOW Finance Corporation ("the Defendant") for Summary Judgment in the above adversary proceeding on the basis that Katrina Morrow ("the Debtor") lacks standing. The Debtor opposes the Motion and has filed her own Cross Motion for Summary Judgment. For the reasons set forth below, the Court will deny the Defendant's Motion and grant the Debtor's Cross Motion.

I. BACKGROUND

On March 25, 2004, the Debtor filed a petition for relief under chapter 7 of the Bankruptcy Code. Prior to the bankruptcy filing, the Defendant had given the Debtor a car loan. When the Debtor defaulted on the loan, the Defendant obtained a judgment

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[1] This Opinion constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure 7052.

against the Debtor. It executed on the judgment and garnished the Debtor's wages.

On the day she filed her bankruptcy petition, the Debtor sent a demand letter to the Defendant requesting that it cease attaching the Debtor's wages and return all wages garnished within the 90 day preference period. The Defendant did cease the attachment of the Debtor's wages but did not return the previously garnished wages.

On April 30, 2004, the Debtor filed the instant adversary proceeding against the Defendant for the avoidance and recovery of the garnished wages. The Debtor alleges that the wages were exempt and, therefore, the garnishment of them is avoidable by her under sections 547 and 522(h) of the Code. The Defendant filed an Answer to the Complaint asserting, inter alia, that the Debtor lacked standing to bring the action. Subsequently, the Defendant filed its Motion for Summary Judgment on the same basis; the Debtor filed a Cross Motion for Summary Judgment on the Complaint. The motions have been fully briefed and are ripe for decision.

II. JURISDICTION

The Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. § 157(b)(2)(F).

III. DISCUSSION

A. Standard for Summary Judgment

To grant a motion for summary judgment, the court must determine if the moving party has established that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The court must assume that undisputed facts set forth in the record are true. See, e.g., Kaszuk v. Bakery and Confectionery Union, 791 F.2d 548, 558 (7th Cir. 1986); In re Trans World Airlines, Inc., 180 B.R. 386, 387 (Bankr. D. Del. 1994); Tanzer v. Int'l Gen. Indus., Inc., 402 A.2d 382, 386 (Del. Ch. 1979).

B. Defendant's Motion for Summary Judgment

The Defendant asserts that it is entitled to summary judgment as a matter of law because the Debtor lacks standing to bring the preference action under sections 547 and 522(h). The Defendant argues that the Trustee is the proper party to bring a preference action under section 547, which clearly states "the trustee may avoid. . . ." 11 U.S.C. § 547(b). Although the Defendant concedes that a debtor may bring a preference action under section 522(h), it argues that five conditions must be met first: (1) the debtor could have exempted the property that is the subject of the alleged preference; (2) the transfer would have been avoidable by the trustee; (3) the trustee has not

attempted to avoid the transfer; (4) the transfer was not a voluntary transfer of property by the debtor; and (5) the property was not concealed by the debtor. See, e.g., In re DeMarah, 62 F.3d 1248, 1250 (9th Cir. 1995); In re Smoot, 237 B.R. 875, 880 (Bankr. D. Md. 1999); In re Wimbish, 95 B.R. 379, 386 (Bankr. W.D. Pa. 1989); In re Weaver, 78 B.R. 135 (Bankr. N.D. Tex. 1987); In re Washkowiak, 62 B.R. 884 (Bankr. N.D. Ill. 1986); In re Ward, 36 B.R. 794 (Bankr. D.S.D. 1984).

The Defendant asserts that the Debtor has failed to prove the third element, that the Trustee has not attempted to avoid the transfer. In this case, the Defendant asserts that the Debtor filed her action before the meeting of creditors was held and, therefore, before the Trustee was even appointed. The Defendant argues that the precipitous action by the Debtor interfered with the Trustee's right to bring the action in the first instance.

While the Defendant asserts that the Debtor has to wait for the Trustee to make his decision whether to sue, the Debtor asserts that there is no such requirement in the Code. There is no temporal requirement in section 522(h); it simply says that the Debtor may avoid a preference if "the trustee does not attempt to avoid such transfer." 11 U.S.C. § 522(h)(2). Therefore, the Debtor argues she did not have to wait for any specific deadline; section 522(h) only requires that at the time

she brings her lawsuit (and during its pendency) the Trustee does not attempt to avoid the transfer. She notes that there is nothing in the statute which requires that she wait until the interim trustee is made permanent or until the permanent trustee makes a decision on whether to bring the preference action. The Debtor states that such a requirement would be burdensome on the Debtor and the Court. Typically the only indication a debtor receives that the trustee will not be bringing a preference action is when the trustee files its final report abandoning the action and the case is closed. Thus, if the Debtor had to wait until then, she would be required to file a motion to reopen the case - a burden on herself and the Court. She argues that the statute has no such requirement.

The Defendant argues, nonetheless, that the right of a trustee to bring a preference action in the first instance would be eviscerated by a finding that a debtor can file a preference action before the trustee is appointed and has had the chance to investigate and bring the action himself. See, e.g., Hartford Underwriters Ins. Co. v. Union Planters Bank, 530 U.S. 1, 8-9 (2000) (third parties may not use section 506(c) to "usurp the trustee's role as representative of the estate") (quoting Collier on Bankruptcy § 1109.05 (15th ed. 1999)); In re Juanita Price, 173 B.R. 434, 440 (Bankr. N.D. Ga. 1994) ("Other parties in interest have no unilateral authority to perform the duties of

the trustee . . . . [A] bankruptcy estate, like a ship, can have but one captain."). Therefore, the Defendant argues we must conclude that the Debtor did not have standing to bring this action. We disagree.

The cases cited by the Defendant do not support its position. In the Hartford Underwriters case, the Court dealt with the efforts of an administrative claimant to bring an action under section 506(c) to surcharge the collateral of the secured creditor. Hartford Underwriters, 530 U.S. at 5. Since section 506(c) only names the trustee, the Court concluded that only the trustee may seek relief under that section. Id. at 6. However, the Court acknowledged that the debtor would have the right to bring an action under section 506(c) because under section 1107 a debtor in possession under chapter 11 has all the rights of a trustee. Id. at 6 n.3. In this case, there is also a specific section which gives the Debtor the right to bring a preference action, namely section 522(h). Thus, the Hartford Underwriters case actually supports the Debtor's position that she has standing.

Similarly, the Price case does not help the Defendant. That case involved a turnover action by the debtor under section 542. Price, 173 B.R. at 439. The Court found that the debtor lacked standing because section 522(h) does not include section 542 as an action that a debtor may file if the trustee does not. Id. at

443. Since the Debtor in this case has filed a preference action under section 547, which is specifically listed in section 522(h), we conclude that the Price case is inapposite.

Finally, of all the cases cited by Defendant, only Wimbish concludes that section 522 requires the debtor to wait for the trustee's decision to sue. Wimbish, 95 B.R. at 379. In Wimbish, the Court dismissed the debtor's preference action for lack of standing, in part because "the trustee [had] not advised the court that he [had] abandoned his right and interest in [the] cause of action." Id. The Wimbish Court did not, however, rest its holding solely on this factor: it also found that the debtor's transfer had been voluntary, thereby precluding the suit by the debtor. Id. In addition, the Court expressed doubt that the trustee could prove the elements of a preference and avoid the transfer. Id.

Wimbish is distinguishable from the action before us because that Court's decision was premised on multiple factors. It is not clear that the Court would have found that the debtor had no standing to bring the action on the timing issue alone. However, to the extent that Wimbish is not distinguishable, we must respectfully disagree with that Court's reading of section 522(h). We agree with the Debtor that the plain language of the statute does not contain a requirement that the Debtor wait any specific period before bringing the preference action. The

statute merely states that, if the trustee does not bring the action, the debtor may. 11 U.S.C. § 522(h). In this case, at the time the Debtor brought the action, the Trustee had not filed a similar action. Thus, the requirements of section 522(h) are met.

In addition, the Debtor notes that, even after receiving notice of the filing of the Complaint by the Debtor, the Trustee did not file a motion to intervene in this action nor file his own preference action against the Defendant. Nor has the Trustee objected to the Debtor's exemptions, including the exemption of the wages which are the subject of this adversary. Further, the Debtor notes that, subsequent to the filing of the Complaint, the Trustee filed a notice of abandonment of all the assets in the estate, including this adversary. Therefore, even under the Wimbish Court's holding, the Debtor has standing.

The Defendant argues that we cannot consider such events because those facts do not appear in the record of this adversary. We disagree. We can consider, at the summary judgment stage, the docket in the main case which does evidence that no action has been taken by the Trustee to pursue this preference action. See, e.g., Maritime Elec. Co., Inc., v. United Jersey Bank, 959 F.2d 1194, 1200 n.3 (3d Cir. 1992) (taking judicial notice of docket entry dates); Levine v. Egidi, No. 93C188, 1993 WL 69146, at *2 (N.D. Ill. March 8, 1993)

(holding that a court can take judicial notice of its own docket); In re Close, No. 93-17145DWS, Adv. 03-0153, 2003 WL 22697825, at *1 n.1 (Bankr. E.D. Pa. Oct. 29, 2003) (taking judicial notice of docket entries in the pending action as well as in the plaintiff's prior bankruptcy case); In re Paolino, No. 85-00759F, 1991 WL 284107, at *12 n.19 (Bankr. E.D. Pa. Jan. 11, 1991) ("Courts may take judicial notice of the contents of their own dockets.").

For the reasons stated above, we reject the Defendant's interpretation of section 522(h) and conclude that a debtor is not required to wait for a trustee's decision to sue. In this case, at the time the Debtor filed her action, the Trustee had not commenced a similar action and the Trustee has now filed a notice abandoning the action. Consequently, we conclude that the Debtor has standing to bring this action.

C. Debtor's Motion for Summary Judgment

The Debtor filed a Cross Motion for Summary Judgment on her preference action. Applying the undisputed facts of this action to the requirements of section 547, we hold that the Debtor is entitled to avoid preferential transfers made to the Defendant in the amount of $633.12.

A preferential transfer may be avoided under section 547(b) if it was:

(1) to or for the benefit of a 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; or
    (B) between 90 days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
(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).

The Debtor supports her Cross Motion for Summary Judgment with an attached affidavit. That affidavit contains documentation that identifies the date and amount of each of the payments made to the Defendant. In contrast, the Defendant has failed to offer any affidavits or other evidence in response. In its Amended Answer to the Complaint, the Defendant simply stated that it was without sufficient information to form a belief as to the amount or date of the transfers. In light of the Debtor's affidavit, such general denials are insufficient. "[A]n adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). We therefore accept as true the undisputed facts

offered by the Debtor. See, e.g., Kaszuk, 791 F.2d at 558; In re Trans World Airlines, 180 B.R. at 387; Tanzer, 402 A.2d at 386.

The Debtor owed the Defendant a debt as the result of a automobile loan. The Debtor's affidavit shows that between January 29 and March 11, 2004, her wages were garnished by the Defendant. The garnishing occurred on six separate occasions within 90 days of Debtor's petition totaling $633.12. Because section 547(f) provides that the Debtor is presumed to be insolvent during the 90 days preceding her bankruptcy, sections 547(b)(1)-(4) are satisfied. Section 547(b)(5) is also satisfied because this is a no-asset chapter 7 case where creditors will receive no distribution. If the transfer is not avoided, the Defendant will have received more than what it was due under the Bankruptcy Code. We therefore hold that the Debtor has satisfied the requirements of section 547(b) and is entitled to avoid preferential transfers made to the Defendant in the amount of $633.12.

IV. CONCLUSION

For the reasons set forth above, we will deny the Defendant's Motion for Summary Judgment and grant the Debtor's Cross Motion for Summary Judgment. An appropriate order is attached.

BY THE COURT:

Dated: December 9, 2004

Mary F. Walrath
United States Bankruptcy Judge

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Debtor	)	
	)	
KATRINA S. MORROW	)	
Plaintiff	)	Adv. No. 04-53366 (MFW)
	)	
vs.	)	
	)	
DOW FINANCE CORP.,	)	
Defendant	)	

ORDER

AND NOW this **9th** day of **December, 2004**, upon consideration of the Defendant's Motion for Summary Judgment and the Debtor's Cross Motion for Summary Judgment and for the reasons set forth in the accompanying Memorandum Opinion, it is hereby

ORDERED that the Defendant's Motion for Summary Judgment is **DENIED**; and it is further

ORDERED that the Debtor's Cross Motion for Summary Judgment is **GRANTED** and judgment is entered in favor of the Debtor and against the Defendant in the amount of $633.12.

BY THE COURT:

Mary F. Walrath
United States Bankruptcy Judge

cc: Barbara James, Esquire[1]

[1] Counsel shall distribute a copy of this Opinion and Order to all interested parties and parties on the attached service list and file a Certificate of Service with the Court.

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