UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In Re:

Warren Dean Stuart,

Debtor.

CASE #96-20025

DECISION & ORDER

BACKGROUND

On January 5, 1996, Warren Dean Stuart (the "Debtor"), who is engaged in farming, trucking, and other business operations, filed a petition initiating a Chapter 11 case.

On February 6, 1996, the Debtor filed a motion (the "Turnover Motion") which: (1) alleged that there were monies due and to become due from Seneca Foods Corporation ("Seneca Foods") for crops sold and delivered and services rendered by the Debtor to Seneca Foods; and (2) requested that such monies be paid over to the Debtor free and clear of any claim by Hoffman Seeds, Inc. ("Hoffman"), a judgment creditor which had served a Restraining Notice (a "Restraining Notice") upon Seneca Foods in November, 1995.

At the February 23, 1996 return date of the Turnover Motion, the attorney for the Debtor advised the Court that: (1) Hoffman had consented to the relief requested, acknowledging that it had filed a pre-petition Restraining Notice but had never obtained an execution lien on the monies due or to become due to the Debtor from Seneca Foods; (2) R.L. Callahan, Inc. had an unpaid balance due it which was secured by a perfected purchase money security interest in the Debtor's 1995 crops and proceeds, which included the monies due or to become due to the Debtor from Seneca Foods; (3) the attorney for Seneca Foods had notified him in response to the Motion that Seneca Foods had

received a Restraining Notice from the attorneys for Blowers Agra-Service, Inc. ("Blowers"), but that it had been released prior to the filing of the Debtor's petition; and (4) the Debtor disputed whether Blowers had any interest in the amounts now due from Seneca Foods because any pre-petition rights which Blowers may have acquired in such monies were avoidable as preferential transfers.

On the return date of the Turnover Motion, the attorney for Blowers appeared and advised the Court that Blowers believed that it had obtained a lien on and an assignment of so much of the monies due to the Debtor from Seneca Foods as was necessary to pay its pre-petition judgment (the "Blowers Judgment"), and that neither the lien nor the assignment was an avoidable preference.

On February 26, 1996, the Court entered an Order directing that the $8,545.66 due on the Blowers Judgment be retained by Seneca Foods or its attorney until the entry of a further order of the Court determining the respective rights of Blowers and the Debtor to such funds (the "Escrow").

On March 13, 1997, the Debtor filed a Motion (the "Blowers Motion") to have the Court determine the respective rights of Blowers and the Debtor to the Escrow, which alleged that: (1) the Blowers Judgment against the Debtor was obtained on September 27, 1995 in the amount of $8,217.94; (2) on September 30, 1995, a Restraining Notice issued by the attorney for Blowers pursuant to Section 5222(b) of the New York Civil Practice Law and Rules ("CPLR 5222(b)") was mailed to Seneca Foods; (3) the Restraining Notice was received by Seneca Foods on October 2, 1995[1]; and (4) on October 12, 1995, the Debtor signed a letter (the "Alleged Assignment") addressed

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[1] Pursuant to New York Civil Practice Law and Rules, the Restraining Notice notified Seneca Foods that:

"Whereas in an action in the Supreme Court of the State of New York, County of

to Blowers which stated that: "An estimated balance of $8545.66 which encludes [sic] interest from now till Feb. 1, 1996 will be paid to Blowers in a two party check sent to Blowers Attorney, Carl Swartz [sic] Feb. 1, 1996"; (5) at some time after October 12, 1995, Blowers advised Seneca Foods by letter that it: "accepts the terms of payment offered by Dean Stuart Farms - two party check $8545.66 on February 1, 1996. As representative of Blowers Agra-Service, I hereby authorize release of restraint of funds on Dean Stuart."; (6) to the extent that the Alleged Assignment transferred an interest to Blowers in the amounts due or to become due to the Debtor from Seneca Foods, either because it was a grant of a security interest in or an absolute assignment of a portion of the funds in payment of the Blowers Judgment, or otherwise, the transfer was an avoidable preferential transfer under Section 547(b)[2]; (7) to the extent that the Alleged Assignment was found

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> Ontario, between Blowers Agra Service, Inc., plaintiff, and W. Dean Stuart, d/b/a Crystal Valley Farm, defendant, judgment dated September 27, 1995, was entered therein in favor of Blowers Agra Service, Inc. against Crystal Valley Farm, for the sum of $8217.94, and there is now actually due thereon the sum of $8217.94.
>
> NOW TAKE NOTICE, that a judgment debtor served with a Restraining Notice is forbidden to make or suffer any sale, assignment, transfer or interference with any property in which he has an interest, except upon direction of the sheriff or pursuant to an order of the court, until the judgment is satisfied or vacated."

[2] Section 547(b) provides:

Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property–

(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;

to be an assignment, it was not an absolute assignment since the Debtor retained an interest in the funds because of the requirement that a two-party check be drawn and delivered; and (8) to the extent that the Alleged Assignment was found to be a security agreement, Blowers took no steps to perfect any resulting security interest by the filing of the required financing statements or the taking of possession of the collateral as required by the New York Uniform Commercial Code.

On April 28, 1997, the Court received a Memorandum on behalf of Blowers (the "Blowers Memorandum"), which alleged that Blowers was entitled to the Funds because: (1) the Restraining Notice placed a valid lien on the Debtor's property (the funds due or to become due to the Debtor from Seneca Foods) prior to the ninety-day period before the date of the filing of the petition; (2) the lien resulting from the Restraining Notice remained in full force and effect after the filing of the petition and at the time sufficient monies became due to the Debtor from Seneca Foods to pay the Blowers Judgment; (3) Blowers' counsel never released the Restraining Notice which remained a valid lien on the monies due or to become due; and (4) the Debtor executed and delivered an

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(4) made—

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety 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.

assignment of the amounts due from Seneca Foods (the Alleged Assignment) which required the amounts necessary to pay the Blowers Judgment to be paid directly to the attorney for Blowers.

DISCUSSION

I. RESTRAINING NOTICE

The law is clear that in New York the mere service of a restraining notice pursuant to CPLR 5222(b) does not create a lien on amounts due or to become due from a garnishee to a judgment debtor, but merely prohibits that garnishee from turning over the proceeds to anyone other than the sheriff. *See In re Sullivan*, 31 B.R. 125, 126 (Bankr. N.D.N.Y. 1983). It is only when an execution is delivered to a county sheriff that the judgment becomes a lien on personal property located in that county. *See In re Cosmopolitan Aviation Corp.*, 34 B.R. 592, 597 (Bankr. E.D.N.Y. 1983). Therefore, since Blowers had no lien under New York State law on the amounts due or to become due to the Debtor from Seneca Foods by reason of its service of a Restraining Notice, the Debtor and Debtor-in-Possession, with the rights of a judicial lien creditor under Section 544, could avoid any interest of Blowers created by the receipt of the Restraining Notice.

II. AVOIDABLE PREFERENTIAL TRANSFER

To the extent that the Alleged Assignment was intended to be, or could be found to be, either a security agreement which granted Blowers a security interest in $8,545.66 of the funds due or to become due to the Debtor from Seneca Foods, or an absolute assignment of such funds, it was a transfer of an interest of the Debtor in the funds which took place no earlier than October 12, 1995, a date clearly within ninety days of the filing of the Debtor's petition on January 5, 1996.

Blowers has not alleged in the Blowers Memorandum or otherwise to the Court that if the

service and receipt of the Restraining Notice did not result in a lien on the monies due or to become due to the Debtor from Seneca Foods the elements of Section 547(b) had not otherwise been proved by the Debtor. Furthermore, Blowers has not alleged that it can meet its burden to demonstrate that it has one of the affirmative defenses to avoidability set forth in Section 547(c). Blowers' only defense to the Debtor's allegation that the October 12, 1995 Alleged Assignment was a transfer which was an avoidable preferential transfer is its incorrect contention that it obtained a lien by reason of the service and receipt of its Restraining Notice outside the ninety-day period before the filing of the petition.

Therefore, it is not necessary for the Court to decide whether under the New York Uniform Commercial Code Blowers properly perfected any security interest which may have resulted from the execution and delivery of the Alleged Assignment, or whether the Alleged Assignment was an unconditional and absolute assignment, since if there was a transfer of the Debtor's interest in the monies due or to become due from Seneca Foods that resulted from the execution and delivery of the Alleged Assignment, it was an avoidable preferential transfer under Sections 547(b) and 550.[3]

CONCLUSION

The Blowers Motion is in all respects granted. The Court finds that Blowers had and has: (1) no interest in the Escrow, which has now been paid over to the Debtor pursuant to a prior Court

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[3] Although determinations of priority or avoidability under Sections 544 and 547 are required by the Rules of Bankruptcy Procedure to be made in adversary proceedings, the parties and the Court have agreed to have the Court decide this matter as a contested matter brought on by the various motions of the parties.

Order; (2) no priority or secured claim in the Debtor's Chapter 11 case; but (3) an unsecured claim for the amount due on the Blowers Judgment to the date of the filing of the petition.

IT IS SO ORDERED.

_____/s/_____
HON. JOHN C. NINFO, II
U.S. BANKRUPTCY JUDGE

Dated: June 4, 1997