DOCKET NUMBER: 95-12471
ADV. NUMBER: 95-1257
JUDGE: M. A. Mahoney
PARTIES: Lonnie L. Mixon, Thomas E. Bryant, Jr., Mary S. Bryant, First Alabama Bank
CHAPTER: 7
ATTORNEYS: A. R. Maples, Jr., A. C. Christian
DATE: 1/7/97
KEY WORDS:
PUBLISHED:

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

THOMAS E. BRYANT, JR. Case No. 95-12471

Debtor.

LONNIE L. MIXON, Trustee,

Plaintiff,

vs. Adv. No. 95-1257

THOMAS E. BRYANT, JR., MARY S. BRYANT,
and FIRST ALABAMA BANK

Defendants.

ORDER AWARDING JUDGMENT TO FIRST ALABAMA BANK IF RELIEF FROM THE STAY IS GRANTED

A. Richard Maples, Jr., Mobile, Alabama, for Lonnie L. Mixon, Trustee.
Alan C. Christian, Mobile, Alabama, for First Alabama Bank.

This matter came before the Court on the complaint of the trustee to compel the turnover of certain bank accounts maintained at First Alabama Bank. First Alabama Bank filed a counterclaim in order to exercise its right of setoff. The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). For the reasons indicated below, the Court finds that First Alabama Bank is entitled to exercise its right of setoff pursuant to 11 U.S.C. § 553.

FACTS

The trustee's complaint seeks from First Alabama Bank (FAB) the turnover of five bank accounts: 14-0459-5863, 14-0509-7110, 14-0689-4140, 14-1001-6815, and 90-31355-56. One

of the accounts, 90-31355-56, is the subject of Adversary No. 95-1200. Account 90-31355 will be dealt with in Orders issued in Adversary 95-1200. Two of the five accounts, 14-0459-5863 and 14-1001-6815, are the subject of Adversary No. 95-1255 and Adversary No. 95-1268. By Order of this Court dated September 27, 1996, those accounts were ordered disbursed to various parties. Therefore, at this time, the trustee seeks turnover of two bank accounts: 14-0509-7110 and 14-0689-4140. FAB seeks to offset the two accounts and a third account, 10-0333-5723, not sought by the trustee.

Accounts 14-0509-7110, 14-0689-4140, and 10-0333-5723 contain the amounts of $18,548.53, $81.29, and $58.79, respectively. The three accounts are maintained solely in the name of the debtor. Defendant, Mary S. Bryant, wife of the debtor, does not have an ownership interest in the accounts. Accordingly, Mary S. Bryant is not an interested party in this proceeding and is dismissed. The debtor has not appeared in this proceeding.

On June 8, 1995, the Circuit Court of Mobile County removed the debtor as Guardian and Conservator for Mobile County in the case of *John M. Tyson, Jr., on behalf of the State of Alabama, In Re: Thomas E. Bryant, Jr.*; Case No. CV-95-2018. The Circuit Court also entered an Amended Order on June 8, 1995, which froze all bank accounts maintained by the debtor. On June 22, 1995, a judgment in the approximate amount of $1.8 million was entered against the debtor in the case of *Elois Gilliam, etc. v. Thomas E. Bryant, Jr., et al.*; Circuit Court of Mobile County, Alabama; Case No. CV-95-2019. On September 19, 1995, an involuntary Chapter 7 bankruptcy petition was filed against the debtor.

Bryant owed debts to FAB as a result of several loans and accounts he maintained at FAB. On June 19, 1995, Bryant was in default to FAB by the terms of the agreement on one fixed rate loan in the amount of $35,025, together with accrued interest and reasonable attorneys

fees. The loan matured on that date and remained unpaid. On June 23, 1995, FAB notified the debtor in a letter that it had declared in default all unpaid indebtedness under the debtor's variable rate consumer loan agreements, fixed rate loan agreements, premium line agreement and MasterCard account. All other debts, except the debt maturing June 19, 1995, were not yet mature by their stated terms. FAB deemed the loans in default for other reasons. As a result of his default under the consumer loan agreements, fixed rate loan agreements, premium line agreement, and MasterCard Card disclosure and customer agreement, the debtor owed FAB at the filing of the bankruptcy case the total sum of $79,159.63, with accrued interest, together with attorney's fees of $11,873.96, for a total sum of $91,033.59. FAB has filed an amended proof of claim dated January 11, 1996, asserting a secured claim in the sum of $18,688.61 by virtue of its claimed right of setoff under 11 U.S.C. § 553, and an unsecured claim for the balance.

The trustee asserts that before any enforceable right of setoff on behalf of FAB arose, debtor's bank accounts were frozen and disbursements from such accounts were forbidden by Court order. Accordingly, at the time the debtor's bankruptcy petition was filed, FAB did not have a claim that was subject to setoff under § 553 of the Bankruptcy Code. The trustee also avers that FAB is precluded from seeking setoff because FAB has not obtained relief from the automatic stay. FAB asserts it has a valid setoff right regardless of the freeze order. FAB has not sought relief from the stay.

LAW

FAB and the trustee disagree as to the effect of the freeze order on FAB's setoff rights. The Mobile County Circuit Court order of June 8, 1995 states:

> First Alabama Bank is hereby ordered to freeze and not disburse any monies from any account maintained by Thomas E. Bryant, Jr., in any capacity, fiduciary, guardian, personal, or otherwise until further orders of the Court.

The trustee asserts that the freeze precludes a setoff. FAB asserts the freeze order merely put a procedural hurdle—a court order—in the way of setoff, but did not prevent it. The Court concludes that the freeze order language does not affect the ultimate rights of any party to the funds in the account. The language only precludes disbursement of funds to preserve the assets until a court review of the assets and obligations of Bryant could occur.

The trustee likens the freeze order to a receivership appointment in which a debtor is divested of possession of assets. Once property is held by a receiver, it is not subject to levy or garnishment. *Callaway v. Security Loan Corp.*, 29 So. 2d 567 (Ala. 1947). In order to set off a bank deposit against a debtor's debt, the debt owed to the creditor must have been mature at the date of the receiver's appointment. *State of North Carolina v. Lawrence*, 378 S.E.2d 207 (N.C. 1989); *Brill v. Citizens Trust Co.*, 492 A.2d 1215 (R.I. 1985).

The Circuit Court order in this case is more like a temporary injunction order rather than the appointment of a receiver. An injunction does not divest a debtor of title to or possession of assets. It only precludes use of the assets without another court order. An injunction enjoins the parties to it from activities specified in the order. In this case, FAB was enjoined or prohibited from disbursing any monies from Bryant accounts it held. The freeze order did not enjoin the maturation of FAB's fixed rate loan of $35,025.00 due June 19, 1995.[1]

Under § 542(b) of the Bankruptcy Code, any entity which owes a debt which is the property of a bankruptcy estate must pay over the funds to the estate to the extent the funds are not subject to a valid right of setoff. The Bankruptcy Code does not create a right of setoff

[1]It also did not prevent FAB from declaring Bryant to be in default on all of his loans on June 23, 1995, regardless of the legal effect. The Court is not making a ruling as to the effect of this default notice as to any loans except the $35,025 matured loan since it is not necessary to the ruling as a whole.

where none exists under state law. Rather, it recognizes the existence of the doctrine under applicable nonbankruptcy law, and provides for further restrictions. 4 LAWRENCE P. KING, COLLIER ON BANKRUPTCY, ¶ 553.02, at 553-10 (15th ed. 1996). Therefore, prior to considering setoff under § 553, the parties must be entitled to setoff under nonbankruptcy law.

In *Atkinson v. Federal Deposit Ins. Corp.*, 635 F.2d 508, 511 (5th Cir. 1981), the Fifth Circuit set forth Alabama state law on setoff:

> It is a well settled rule of banking law that in order for a setoff to be valid, the cross demands between the bank and the depositor or depositors must be "mutual." *King v. Porter*, 230 Ala. 112, 160 So. 101 (Ala. 1935); *First Nat'l Bank v. Capps*, 208 Ala. 207, 94 So. 109 (Ala. 1922); *see,* 68 A.L.R. 3d 192. Those mutual demands must be "due from one party to the other in the same right." *First Nat'l Bank v. Capps*, 94 So. at 110. In other words, for the bank to set off a deposit against the unpaid balance of a loan (cross-demands), those competing claims must exist mutually between the same parties.

In *Rainsville Bank v. Willingham*, 485 So.2d 319 (Ala. 1986), the Alabama Supreme Court addressed setoff and mutuality. Citing *King v. Porter*, 230 Ala. 112, 160 So. 101 (1935), the Court reasoned that when a deposit is made to a bank account it becomes a debt to the customer; and, when the bank also loans money to the depositor, a mutual debt exists, and the bank may, when the loan matures, apply the money it owes the depositor towards the depositor's debt to the bank. "Mutuality of obligation in Alabama, therefore, requires that the demands are between parties of like capacity and that the demands are mature at the time of setoff." *B. F. Goodrich Employees Credit Union v. Patterson (In re Patterson)*, 967 F.2d 505 (11th Cir. 1992).

The appropriate time at which to measure the rights of the parties to a bankruptcy proceeding is at the filing of the case. This is the moment at which the bankruptcy estate is created. 11 U.S.C. § 541. This is the moment the automatic stay becomes effective. 11 U.S.C. § 362(a). Therefore, the rights of FAB to setoff must be determined as of September 19, 1995.

A debt matures on the date it is due. *Bank of Chicago-Garfield Ridge v. Park Nat'l Bank*, 237 Ill. App. 3d 1085, 606 N.E. 2d 72 (Ill. App. 1993). On September 19, 1995, FAB had a mature debt owed to it by Bryant. The $35,025 debt came due June 19, 1995. The freeze order did not affect the maturity of the loan due by Bryant to FAB. The Circuit Court order prevents disbursement of assets, not ripening or securing of rights. The debts of FAB to Bryant for $18,688.61 and Bryant to FAB for $35,025 were mutual and mature on September 19, 1995.

The Court concludes that FAB is entitled to set off the debtor's deposits. As stated in *In re Selma Apparel Corp.*, 155 B.R. 241 (Bankr. S.D. Ala. 1992):

> Setoff is a favored remedy . . . Congress intended that the right to setoff . . . would remain inviolate despite the filing of a bankruptcy petition.

155 B.R. at 244.

Fairness to all creditors makes this result appropriate. Otherwise, creditors other than FAB, such as Elois Gilliam, could proceed to secure judgments, file financing statements, and levy, attach or garnish assets up to September 19, 1995, but FAB would be precluded from protecting its rights. All creditors' status would be measured as of the bankruptcy filing except FAB which would be held to its position of 2 1/2 months prior to bankruptcy. The inequity is clear.

None of the exceptions to the setoff right under Section 553(a) were proven to exist by the trustee. Therefore, setoff by FAB is appropriate under state law and Section 553. However, setoff requires that FAB obtain relief from the stay. 11 U.S.C. § 362(a)(7). It has not been sought yet. Unless it is sought promptly and is allowed, turnover to the trustee will be appropriate. *U.S. v. Ruff (In re Rush-Hampton Indus., Inc.)*, 98 F.3d 614 (11th Cir. 1996).

Therefore, it is ORDERED and ADJUDGED that if First Alabama Bank seeks relief from the automatic stay pursuant to 11 U.S.C. § 362 within 15 days of the date of this order and the relief is granted, the plaintiff, Lonnie L. Mixon, shall take nothing from the defendants on his complaint and First Alabama Bank is awarded judgment against plaintiff, Lonnie L. Mixon, to the extent that FAB may set off the fixed rate loan of $35,025.00 against accounts 14-0509-7110, 14-0689-4140 and 10-0333-5723 in the name of Thomas E. Bryant, Jr.

Dated: January 7, 1997

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MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE