DOCKET NUMBER: 95-10908
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JUDGE: M. A. Mahoney
PARTIES: Wendy Ann Morgan, Teledyne Continental Employees Federal Credit Union
CHAPTER: 7
ATTORNEYS: W. G. Overton, Jr., R. D. Johnston, Jr., C. Kern
DATE: 7/25/95
KEY WORDS:
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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

WENDY ANN MORGAN, Case No. 95-10908-MAM-7

Debtor.

ORDER PARTIALLY GRANTING MOTION TO SET ASIDE ORDER AND TO RECONSIDER DENIAL OF MOTION TO PROHIBIT OR CONDITION THE USE OF CASH COLLATERAL

W. G. Overton, Jr., Mobile, Alabama for Debtor
Robert D. Johnston, Jr., Mobile, Alabama for Movant
Christopher Kern, Mobile, Alabama, Trustee

This matter came before the Court upon the motion of Teledyne Continental Employees Federal Credit Union ("Credit Union") requesting the Court set aside its previous order dated June 5, 19995 denying the Credit Union's motion to set off shares or in the alternative to condition the use of cash collateral and granting Debtor's motion for damages against Credit Union. The Court has jurisdiction over this matter pursuant to 11 U.S.C. §§ 157 and 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (M). Proper notice of the hearing was given and appearances were as noted in the record. Based upon the reasoning below, Credit Union's motion is granted in part.

The Debtor had an open end line of credit agreement with Credit Union dated May 22, 1991 ("Credit Agreement") which required monthly payments of $114.52 to be made to Credit Union on or before the 20th day of each month. Debtor filed for Chapter 7 protection on April 21, 1995, one day after the due date of her April loan payment. Debtor did not pay her April 1995 loan obligation. Debtor's total outstanding balance to Credit Union on the Credit Agreement on April 21, 1995 was $2,399.81. Debtor had $1,598.84 in her checking account on

this date. Based on the Credit Agreement, on April 27, 1995, Credit Union filed an ex parte motion for relief from the automatic stay or in the alternative to prohibit or condition use of cash collateral. Concurrent with filing this motion, pursuant to Fed. R. Bankr. P. 7067, Credit Union tendered to the Court the prepetition shares of Debtor in the amount of $1,598.84 and refused to honor any drafts of Morgan. This was done in accord with the procedure set forth in *B. F. Goodrich Employees Federal Credit Union v. Patterson (In re Patterson)*, 967 F.2d 505 (11th Cir. 1992). Debtor opposed this motion and filed an objection seeking damages in the amount of all returned checks and penalties incurred as a result of Credit Union's failure to honor Debtor's checks when presented for execution.

On June 5, 1995, this Court ruled as follows based on findings and conclusions read into the record on May 30, 1995: The amount due Credit Union on April 21, 1995 was $114.52. The request of Credit Union for setoff was granted in the amount of $114.52. Credit Union's motion to condition the use of the remaining $1,484.32 as cash collateral was denied. The remainder of the funds interpled to the Court were to be disbursed to Debtor. Finally, Credit Union was to pay Morgan $140.00 as damages for the return of her checks for which payment was refused. On June 2, 1995, Credit Union filed a timely motion to set aside and reconsider the part of this ruling relating to Debtor's use of her checking account funds and to set aside and reconsider the ruling limiting setoff.

The Court's oral findings and conclusions regarding partial setoff are incorporated from the prior oral ruling by reference. Setoff of $114.52 is allowed because one prepetition payment was due at filing. Setoff of the entire debt is not appropriate since the debt was never accelerated before Morgan filed her Chapter 7 case.

Credit Union argues that the Court incorrectly found the checking account did not constitute cash collateral subject to Credit Union's lien and Credit Union should be offered adequate protection if the liened funds are to be used under 11 U.S.C. § 363(e). Credit Union is correct. The Court erred in not protecting Credit Union's interest in its June 5, 1995 order. Paragraph 7 of the Credit Agreement states that Credit Union has a lien in Morgan's shares.[1] Further, ALA. CODE § 5-17-14 (1975) gives Credit Union a lien on all shares and deposits of Debtor for all sums due.[2] This lien by Alabama statute impairs Debtor's funds and cannot be avoided.[3] *Fredrick v. America's First Credit Union*, 58 B.R. 56 (Bankr. N.D. Ala. 1986). The

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[1]Paragraph 7 says:

> **Your Savings Are Security for this Contract**
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> By signing this contract, you give us a security interest—called a "pledge"—in all present or future shares or deposits in the credit union which you have the right to withdraw for your personal use.

Exhibit "A" of the initial ex parte motion.

[2]Section 5-17-4.

> **Capital; Lien on Shares and Deposits of Members; Entrance Fee**
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> The capital of a credit union share consists of the payments that have been made to it by the several members thereof on shares. The credit union shall have a lien on the shares and deposits of a member for any sum due to the credit union from said member or for any loan endorsed by him.

[3]Some cases question the basis for such a lien. *E.g., Moreira v. Digital Employees Federal Credit Union (In re Moreira)*, 173 B.R. 965 (Bankr. D. Mass. 1994); *U.S. v. Bell Credit Union*, 635 F. Supp. 501 (D.C. Kan. 1986). These cases hold that a share account or deposit account in a credit union creates a debtor-creditor relationship between the customer and credit union. The credit union owes a debt to its customer. The debt is an account receivable of the customer. Therefore, the credit union holds its own funds and giving a credit union a lien on its own funds is meaningless. This is a correct statement of the general law on this subject. However, the Alabama legislature clearly intended to create a lien in the share or deposit account or account receivable of a credit union customer. The legislature may not have clearly defined

fact that Debtor was or was not current in her obligation to Credit Union at the filing of her case does not change this fact. The remaining debt owed is a claim, 11 U.S.C. § 101(5), secured by the checking account funds, 11 U.S.C. § 506(a), and, if the security is used, it can only be used in accord with 11 U.S.C. § 363(e).

Even if relief from stay is denied (as it has been in this case), Credit Union is entitled to be adequately protected pursuant to 11 U.S.C. § 363(e). *In re Lough*, 163 B.R. 586 (Bankr. D. Idaho 1994). Section 363(e) states in part:

> (e) notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold or leased, or proposed to be used sold or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale or lease as is necessary to provide adequate protection of such interest.

The effect of this statute is that until Credit Union is adequately protected, the funds in the account cannot be used or disposed of without Credit Union's consent or the authorization of this Court. Credit Union does not consent to use of the funds. This Court has ruled in another district that debtors have a heavy burden in adequately protecting secured parties. *In re Polzin*, 49 B.R. 370 (Bankr. D. Minn. 1985). In the *Polzin* case, this Court concluded:

> What constitutes adequate protection under 11 U.S.C. § 363 is the same as what constitutes adequate protection under 11 U.S.C. § 362. However, due to the fact that the collateral is consumed or used up in a § 363 context and the creditor's use is not merely delayed as in a § 362 context, the adequate protection standard is a strict one. It is the debtor's burden to demonstrate that the secured party is adequately protected. (Citations omitted.)

Id. at 371-72.

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what interest of the customer was to be liened, but it is clear the statute's intent was to secure the Credit Union position. The statute, coupled with the Credit Agreement, is sufficient in this case. The Credit Agreement, if not the statute, makes clear to the customer that the share account itself or the receivable is subject to Credit Union seizure. Morgan signed the Credit Agreement, which clearly stated, "This is a contract. Be sure to read it."

The Eleventh Circuit has recognized the subjective nature of adequate protection, concluding that there must be an individual determination of the value of the interest and whether a proposed use of cash collateral threatens that value. *In re George Ruggiere Chrysler Plymouth*, 727 F.2d 1017, 1019 (1984). Given that the collateral in this case is a checking account which is less than the amount of the debt, if the Debtor is allowed to use the funds, Credit Union's security will evaporate. Morgan offered no alternate collateral to Credit Union, nor did she offer any other means of protecting it. Therefore, use of the checking account funds must be denied.

The issue of the $140 in damages awarded Debtor resulting from Credit Union's decision to deposit funds from Debtor's account into the Registry of the Court must be reviewed in light of the Court's ruling that Credit Union had a right to pay the funds into the Court Registry account. This action, per the *Patterson* decision,[4] is not a violation of the automatic stay. Therefore, damages resulting to Morgan from Credit Union's action may be awarded, if at all, under some theory other than violation of the stay under 11 U.S.C. § 362(h). Debtor incurred the charges by having to pay a return fee to the recipients of checks she wrote on her Credit Union account which were presented for payment after the Credit Union deposited her account balance in the Registry of the Court.[5] The Court was given no evidence of any tort, contract or statutory basis for such a charge. Unfortunately, Morgan must suffer the consequence of her retention of her checking account at the credit union to which she owed money on the date she filed bankruptcy. *In re Lough*, 163 B.R. 586 (Bankr. D. Idaho 1994); *Nat'l Bank of Georgia v. Air*

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[4]*Supra* at 2.

[5]Ms. Morgan had to pay each of seven vendors a $20 charge when she covered her NSF checks.

Atlanta, Inc. (In re Air Atlanta, Inc.), 74 B.R. 426 (Bankr. N.D. Ga.), *aff'd* 81 B.R. 724 (N.D. Ga. 1987); *Williams v. American Bank of the Mid-Cities, N.A. (In re Williams)*, 61 B.R. 567 (Bankr. N.D. Tex. 1986); *In re Quality Interiors*, 127 B.R. 391 (Bankr. N.D. Ohio 1991). The damage award of $140 to Morgan must be set aside.

Therefore, it is ORDERED:

1. The motion of Credit Union to reconsider the order denying the motion for setoff is DENIED and setoff is limited to $114.52.

2. The motion of Credit Union to reconsider and set aside the order granting Debtor $140.00 in damages is GRANTED and Debtor is awarded no damages.

3. The motion to reconsider the order to deny Credit Union's motion to condition the use of cash collateral is GRANTED and Debtor is not authorized to use the funds at issue since no adequate protection has been offered to Credit Union.

4. The funds interpled into the Court registry by Credit Union are to be returned to Debtor's account and shall remain there until the debt to Credit Union is paid in full or until otherwise ordered by this Court.

Dated: July 25, 1995

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MARGARET A. MAHONEY
U.S. BANKRUPTCY JUDGE