

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

JOHNNIE D. JOHNS, JR.
AMY D. JOHNS,

Case No. 99-13953-MAM-7

Debtors.

LYNN HARWELL ANDREWS, TRUSTEE,

Plaintiff,

v.

Adv. No. 03-01098

LIBERTY MUTUAL INSURANCE COMPANY

Defendant.

ORDER DISMISSING PLAINTIFF'S ADVERSARY PROCEEDING

Lionel C. Williams, Mobile, Alabama, Attorney for Lynn Harwell Andrews
Dennis McKenna, Mobile, Alabama, Attorney for Liberty Mutual Insurance Company

This matter is before the Court on the plaintiff's adversary proceeding complaint to avoid the debtors' postpetition transfer of property to the defendant. 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) and the Court has authority to enter a final order. For the reasons indicated below, the Court finds that the trustee's adversary proceeding against Liberty Mutual Insurance Company is due to be dismissed with prejudice.

FACTS

The debtors, Johnnie D. Johns, Jr. and Amy D. Johns, filed a chapter 13 bankruptcy case in this Court on November 10, 1999. Amy Johns was involved in a car accident on December 4, 2001 in which she was found at fault. The accident resulted in property damage to the vehicle of the other driver. Mrs. Johns testified that, after the accident, the State of Alabama notified her

by phone that her driver license had been suspended because she did not have automobile insurance at the time of the accident. During the same conversation, the State of Alabama gave Mrs. Johns a telephone number to contact the insurance company representing the driver of the other car involved in the accident. Mrs. Johns testified that she called the number and spoke with someone from the Bell Corporation (“Bell”), which she understood represented Liberty Mutual Insurance Company (“Liberty”) in a claim for property damage against her.

Mrs. Johns entered into a \$2,700 settlement with Bell for the property damage claim and sent Bell a money order for that amount in May 2002. Mrs. Johns testified that she did not know if Bell remitted the money to Liberty but she did receive a written release from Bell stating that she was discharged from any further obligations on the property damage claim. The release was signed by the director of operations for Bell and it states that Bell was acting as the agent of Liberty when it entered into the settlement. The Johns converted their chapter 13 bankruptcy case to a chapter 7 case on November 20, 2002. They listed the \$2,700 settlement payment to Bell in the statement of financial affairs that accompanied their bankruptcy schedules. However, they listed it as a payment to Liberty rather than to Bell.

The trustee reviewed the Johns’ statement of financial affairs and filed an adversary proceeding complaint against Liberty. The trustee argues that the Johns’ payment to Liberty is an avoidable postpetition transfer of the Johns’ interest in property. Liberty argues that the trustee failed to prove that Bell acted as Liberty’s agent in the settlement with Mrs. Johns. Liberty further argues that Bell should have been listed as a defendant in this case because the trustee failed to prove that Liberty ever received the \$2,700 payment that the trustee alleges is an avoidable postpetition transfer.

LAW

Section 348(d) of the Bankruptcy Code “provides for postpetition claims to be treated as if they arose before the filing date in cases converted to Chapter 7.” *Piper Aircraft Corp. v. Calabro (In re Piper Aircraft Corp.)*, 169 B.R. 766, 777 (Bankr. S.D. Fla. 1994). Section 348(d) states in relevant part:

(d) A claim against the estate or the debtor that arises after the order for relief but before conversion in a case that is converted under section 1112, 1208, or 1307 of this title, other than a claim specified in section 503(b) of this title, shall be treated for all purposes as if such claim had arisen immediately before the date of the filing of the petition.

The Johns filed a chapter 13 bankruptcy case on November 10, 1999. Mrs. Johns subsequently was found at fault in a car accident for which she settled a related property damage claim with Bell for \$2,700. The Johns later converted their bankruptcy case to a chapter 7 proceeding. The claim brought against Mrs. Johns by Bell and the \$2,700 payment by Mrs. Johns to settle the claim both occurred postpetition (after the Johns filed their chapter 13 case). Ordinarily, the claim brought against Mrs. Johns would be treated as a postpetition claim. However, when the Johns converted their case to a chapter 7, Bell’s claim became a prepetition claim under §348(d) of the Bankruptcy Code because its claim is treated as if it arose immediately before the Johns filed their chapter 13 case. *Piper* at 777. Mrs. Johns’ payment to Bell is unaffected by §348(d); therefore, 11 U.S.C. §549 applies to her transfer rather than 11 U.S.C. §547 which only applies to prepetition transfers. *See Nicola v. F.I.E. Corp. (In re Omaha Midwest Wholesale Distrib., Inc.)*, 94 B.R. 157 (Bankr. D. Neb. 1988).

Section 549(a) of the Bankruptcy Code provides “the general rule that a Trustee may avoid a post-petition transfer if the transfer was not authorized by the Court or by Section 303(f)

or 542(c)” *Tavormina v. Brummer (In re Centre de Tricots De Gaspe)*, 782 F.2d 905, 907 (11th Cir. 1986). Section 549(a) states:

- (a) Except as provided in subsection (b) or (c) of this section, the trustee may avoid a transfer of property of the estate--
 - (1) that occurs after the commencement of the case; and
 - (2)(A) that is authorized only under section 303(f) or 542(c) of this title; or
 - (B) that is not authorized under this title or by the court.

The exceptions to the trustee’s avoiding power provided for in §549(a) “were not alleged to apply to this case and they do not.” *See Egstad v. American Telecom Network Communications, Inc. (In re One to One Communications, Inc.)*, Case No. 95-12383, Adv. No. 97-01226 (Bankr. S.D. Ala. November, 26, 1997). Moreover, Liberty did not contest that the trustee may avoid the Johns’ postpetition payment to Bell under §549(a). Instead, Liberty argues that the trustee cannot recover the postpetition payment from Liberty because the trustee failed to prove that Bell acted as Liberty’s agent in the settlement with Mrs. Johns.

The trustee’s “right of recovery depends on 11 U.S.C. §550.” *Bonded Financial Services, Inc. v. European American Bank*, 838 F.2d 890, 891 (7th Cir. 1988). Section 550 states in relevant part:

- (a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section . . . 549 . . . of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from--
 - (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or
 - (2) any immediate or mediate transferee of such initial transferee.
- (b) The trustee may not recover under section [FN1] (a)(2) of this section from--
 - (1) a transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided; or
 - (2) any immediate or mediate good faith transferee of such transferee.

To recover against Liberty under §550, the trustee must prove that Liberty was “the initial transferee, the entity for whose benefit the transfer was made, or a subsequent transferee of the initial transferee.” *Nordberg v. Societe Generale (In re Chase & Sanborn Corp.)*, 848 F.2d 1196, 1198 (11th Cir. 1988). The Court will not consider each of the three types of §550 liability because it holds that the trustee failed to show that Bell was Liberty’s agent or that Liberty ever received Mrs. Johns’ payment.

Mrs. Johns testified that she called a number provided to her by the State of Alabama in reference to a car accident in which she was found at fault. She spoke with someone from Bell, who indicated that Bell represented Liberty in a property damage claim against her. Mrs. Johns entered into a \$2,700 settlement agreement with Bell and sent Bell a money order in that amount. Mrs. Johns did not know if Bell remitted the money to Liberty although she did receive a written release from Bell stating that she was discharged from any further obligations on the property damage claim.

In evidence was the written release sent to Mrs. Johns by Bell. The written release was signed by the director of operations for Bell and it states that Bell was acting as the agent of Liberty when it entered into the settlement. Also in evidence was the Johns’ statement of financial affairs which lists the \$2,700 payment to Bell as a payment to Liberty. However, the Court cannot presume that Bell was acting as Liberty’s agent in its negotiations with Mrs. Johns because it is the trustee’s obligation to present “substantial evidence of an agency relationship.” *Lincoln Log Home Enterprises, Inc. v. Autrey*, 836 So.2d 804, 806 (Ala. 2002).

The Court finds that the trustee did not offer “substantial evidence” that Bell acted as Liberty’s agent in Bell’s settlement negotiations with Mrs. Johns. Although Mrs. Johns testified that Bell indicated to her that it was acting as Liberty’s agent, she was unaware if Liberty ever

received the money order she sent to Bell. Additionally, Mrs. Johns testified that the only release she received after making the payment was from Bell, not from Liberty. The release summarily states that Bell is acting as Liberty's agent. Without more evidence to show that Liberty maintained a right of control over Bell's actions in executing the settlement with Mrs. Johns or to show that Liberty actually received the payment, the Court must find that the trustee failed to meet her burden to offer "substantial evidence" of an agency relationship between Liberty and Bell. Therefore, the trustee may not recover from Liberty under §550 of the Bankruptcy Code.

CONCLUSION

For all of the reasons stated above, the Court finds that the trustee's adversary proceeding against Liberty Mutual Insurance Company is due to be DISMISSED with prejudice.

Dated: July 30, 2003


MARGARET A. MAHONEY
U.S. BANKRUPTCY JUDGE