

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 04-10390-JMD
Chapter 7

Humphrey Guluzian and
Audrey Daigle-Guluzian,
Debtors

Timothy P. Smith,
Chapter 7 Trustee,
Plaintiff,

v.

Adv. No. 04-1142-JMD

Audrey Daigle-Guluzian a/k/a
Audrey S. Guluzian,
Massachusetts Asset Financing Corp.,
Joseph C. Sullivan, Executive Director,
Massachusetts State Lottery Commission,
Defendants

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MEMORANDUM OPINION

I. INTRODUCTION

Timothy P. Smith, Chapter 7 trustee (the “Trustee”), filed a complaint against Defendants Audrey Daigle-Guluzian (the “Debtor”), Massachusetts Asset Financing Corporation (“MAFC”) and Joseph C. Sullivan, Executive Director of the Massachusetts State Lottery Commission (“Mass

Lottery”), alleging that the Debtor’s right to the remainder of twenty annual lottery prize payments¹ is property of the bankruptcy estate (Count I), that MAFC does not hold a valid secured claim against a portion of the lottery payments (Count II), and that the Debtor’s payment to MAFC in the amount of \$30,000.00 on or about January 12, 2004 is avoidable as a preferential transfer under 11 U.S.C. § 547 and is recoverable by the Trustee (the “Complaint”). The Debtor and the Mass Lottery did not answer the Complaint and default judgments were entered against them on October 6, 2004 (Doc. Nos. 21 and 22). MAFC filed an answer on July 26, 2004 (Doc. No. 8). On November 15, 2004, MAFC and the Trustee filed cross motions for summary judgment (Doc. Nos. 30 and 31).

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the “Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire,” dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. DISCUSSION

A. Procedural Background

On October 15, 2004, the Trustee and MAFC filed a joint stipulation of facts (Doc. No. 23) that included an agreement to admit into evidence seven documents which were submitted as exhibits to the stipulation on October 18, 2004 (Doc. No. 24) (hereinafter collectively the “Stipulation”). Under the terms of the Stipulation, the Trustee and MAFC agreed that the unpaid lottery payments are property of the bankruptcy estate, subject only to MAFC’s claim of a valid

¹ The first payment was made in January 1995.

security interest in a portion of the payments. They further agreed that MAFC received a payment from the Debtor in the amount of \$30,000.00 on January 12, 2004.

Shortly thereafter the parties filed their cross motions for summary judgment. Although the Stipulation includes an agreement between the Trustee and MAFC on numerous factual matters and an agreed admission into evidence of several documents, the parties did not agree that the Court could enter a final judgment based upon a stipulated record. The Stipulation merely supplements the summary judgment record. Accordingly, the Court may only consider the cross motions for summary judgment under the legal standard applicable to such motions. See Watson v. Deaconess Waltham Hosp., 141 F.Supp.2d 145, 147 (D. Mass. 2001) (citing Boston Five Cents Sav. Bank v. Dep't. of Hous. & Urban Dev., 768 F.2d 5, 11-12 (1st Cir. 1985)).

Under Rule 56(c) of the Federal Rules of Civil Procedure, made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7056, a summary judgment motion should be granted only when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” “Genuine,” in the context of Rule 56(c), “means that the evidence is such that a reasonable jury could resolve the point in favor of the nonmoving party.” Rodriguez-Pinto v. Tirado-Delgado, 982 F.2d 34, 38 (1st Cir. 1993) (quoting United States v. One Parcel of Real Property, 960 F.2d 200, 204 (1st Cir. 1992)). “Material,” in the context of Rule 56(c), means the fact has “the potential to affect the outcome of the suit under applicable law.” Nereida-Gonzalez v. Tirado-Delgado, 990 F.2d 701, 703 (1st Cir. 1993). Courts faced with a motion for summary judgment should read the record “in the light most flattering to the nonmovant and indulg[e] all reasonable inferences in that party’s favor.” Maldonado-Denis v. Castillo-Rodriguez, 23 F.2d 576, 581 (1st Cir. 1994).

B. Summary Judgment Record

The summary judgment record establishes that the Debtor borrowed \$97,000.00 from MAFC on July 28, 2000. The loan was evidenced by a promissory note, loan agreement (the “Loan Agreement”), affidavit of the Debtor, a limited, irrevocable and durable power of attorney from the Debtor to agents of MAFC, and a spousal and issue waiver of rights executed by the Debtor’s spouse, all dated July 28, 2000. On May 30, 2002, the Debtor borrowed an additional \$44,626.81 from MAFC. In connection with the additional loan, the Debtor executed and delivered an amendment to the Loan Agreement and an allonge to the original promissory note. Under the terms of the Loan Agreement, the Debtor’s obligations to MAFC were secured by “a lien, pledge and security interest in and to all of [the Debtor’s] accounts receivable (including and money due [the Debtor] on the lottery prize).” See paragraph 9 of the Loan Agreement included in the Stipulation as Exhibit A. The summary judgment record does not indicate that MAFC ever filed any financing statements with respect to its security interest.

Under the terms of the Loan Agreement, the Debtor agreed to direct Mass Lottery to forward all future annual payments to her at a private mailbox address and to authorize MAFC to remove all mail and deposit checks from Mass Lottery into a segregated bank account opened in her name. Under the power of attorney and/or the terms of the segregated bank account in the Debtor’s name, the Debtor granted MAFC’s agents the power to deposit the annual check from Mass Lottery, withdraw sufficient funds to make the required annual payment to MAFC, and send any remaining balance to the Debtor. It appears the Debtor complied with the requirements of the Loan Agreement through the annual payment made on or about January 12, 2004. The Debtor commenced this bankruptcy proceeding on February 9, 2004.

C. Count I: Lottery Prize Payments as Property of the Estate

In the Stipulation, the Trustee and MAFC agree that the Debtor's interest in the Mass Lottery prize payments is property of the estate as alleged by the Trustee in Count I of the Complaint. Therefore, the Trustee is entitled to summary judgment against MAFC on Count I of the Complaint.

D. Count II: Validity of MAFC's Security Interest

The Trustee argues that MAFC does not hold a valid security interest in the lottery prize payments because Massachusetts law, in particular, M.G.L. c. 10, § 28 provides:

No right of any person to a [Massachusetts state lottery] prize shall be assignable, except that payment of any prize may be made to the estate of a deceased prize winner . . . and except that any person pursuant to an appropriate judicial order may be paid the prize to which the winner is entitled and except that the commission may, by regulations adopted pursuant to section twenty-four, permit assignment of prizes for purposes of paying estate and inheritance taxes, or to a trust the beneficiaries of which are the prize winner, his mother, father, children, grandchildren, brothers, sisters, or spouse. . . This section prevails over section 9-405 of chapter 106.

(emphasis added). The last sentence of this section was added as of July 1, 2001, after the execution of the Loan Agreement, but before the execution of the amendment to the Loan Agreement. MAFC argues that the payment receipt scheme under the Loan Agreement was not an assignment prohibited by Massachusetts law, but merely resulted in the Debtor "designating" it as a secured party. MAFC claims that the Loan Agreement does not violate the prohibition on assignment of lottery prizes because MAFC has not and does not claim that Mass Lottery must send future annual payments directly to it.

In Singer Friedlander Corp. v. State Lottery Comm., 670 N.E.2d 144, 145 (Mass. 1996), the Massachusetts Supreme Judicial Court held that the language in the first clause of M.G.L. c. 10, § 28, prohibiting all assignments of rights to lottery prizes is unambiguous. MAFC does not

contend that the assignment in the Loan Agreement with the Debtor comes within any of the exceptions to the prohibition on assignments of lottery prizes in the statute. MAFC contends that the Debtor's assignment to it is not contrary to applicable Massachusetts law because it is not seeking to enforce the assignment against Mass Lottery. However, MAFC has not provided any legal theory or authority for the proposition that an assignment unenforceable against Mass Lottery is enforceable against the Trustee.

The Trustee stands in the shoes of the Debtor with respect to the lottery prize. The prepetition Debtor could have directed Mass Lottery to send her annual payments to a different address and Mass Lottery would have been obligated to do so. MAFC could not have compelled Mass Lottery to continue sending payments to the segregated bank account. If the prepetition Debtor had taken such action, MAFC may have been able to sue her for a breach of the Loan Agreement, accelerate the promissory note or sue her on the note. However, MAFC offers no argument or authority giving it an enforceable lien on the future payments to be made to the Debtor by Mass Lottery. Accordingly, if the future lottery payments are property of the estate, which MAFC concedes, the Trustee, or this Court, may direct that such payments be made to the Trustee.

MAFC has not articulated any theory or authority for the proposition that it has a valid lien on lottery payments enforceable under applicable Massachusetts law. Under the terms of the promissory note and the Loan Agreement, MAFC may have a right to payment or a right to an equitable remedy for breach of performance. However, such rights only give rise to a claim in this bankruptcy proceeding, not a security interest. See 11 U.S.C. § 101(5) and (51).

After the execution of the Loan Agreement and prior to the 2002 amendment to the Loan Agreement, Massachusetts law was amended to bring lottery payments within the scope of the Uniform Commercial Code for the first time. Effective July 1, 2001, the Uniform Commercial

Code, M.G.L. c. 106 (the “UCC”), was amended to include lottery proceeds in the definition of “accounts” that could be subject to a security interest. Midland States Life Ins. Co. v. Cardillo, 797 N.E.2d 11, 17 (Mass. App. Ct. 2003). The 2001 amendments to the UCC also rendered statutory restrictions on assignments generally ineffective. Id. at 17-18. However, the 2001 legislation amending the UCC also included an amendment to the Massachusetts lottery statute, M.G.L. c. 10, § 28, providing that the lottery statute prohibition on assignments prevails over the UCC provisions.² Id. at 18. Accordingly, the amendments to the UCC in 2001 did not remove the prohibition under Massachusetts law against assignments of lottery prizes payable by Mass Lottery. For these reasons, the Court must grant summary judgment for the Trustee and deny summary judgment to MAFC on Count II.

E. Count III: Avoidance of January 12, 2004, Payment to MAFC

In the Stipulation, MAFC admitted the receipt of a \$30,000.00 payment from the Debtor on January 12, 2004, twenty-eight days before the filing of the Debtor’s bankruptcy petition, and agreed to the allegations in paragraphs 30 and 31 of the Complaint. Accordingly, the Trustee has established a prima facie case that the January 12, 2004, payment of \$30,000.00 to MAFC by the Debtor is a preferential transfer under section 547(b) of the Bankruptcy Code. However, MAFC contends that it has a complete defense to the Trustee’s preference claim under the ordinary course exception in section 547(c)(2) of the Bankruptcy Code. The ordinary course defense may be raised by an unsecured creditor. Union Bank v. Wolas (In re ZZZZ Best), 502 U.S. 151 (1991). The summary judgment record establishes that the Debtor made a series of annual payments to

² The UCC, M.G.L. c. 106, § 9-405(j), provides that the blanket revocation of statutory prohibitions on assignments prevails over inconsistent provisions of “existing or future statute, rule or regulation of the commonwealth unless the provision is contained in a statute of the commonwealth, refers expressly to this section and states that the provision prevails over this section.”

MAFC for four consecutive years from 2001 to 2004. Considering the pleadings and the summary judgment record in the light most favorable to MAFC, MAFC may be able to establish the necessary evidentiary record to support its claim to an affirmative defense under section 547(c)(2) of the Bankruptcy Code. Similarly, the Trustee may be able to defeat that affirmative defense. The summary judgment record does not establish a sufficient record from which the Court could find that it would be impossible for the Trustee to defeat MAFC's defense.

Accordingly, the Court shall grant partial summary judgment to the Trustee to the extent that payment of \$30,000.00 to MAFC on January 12, 2004, is a preferential transfer, subject to the affirmative defense available to MAFC under section 547(c)(2) of the Bankruptcy Code, and shall deny summary judgment to MAFC on Count III of the Complaint.

III. CONCLUSION

For the reasons set forth above, the Court shall (1) grant summary judgment for the Trustee and deny summary judgment to MAFC on Count I of the Complaint; (2) grant summary judgment for the Trustee and deny summary judgment to MAFC on Count II of the Complaint; and (3) grant partial summary judgment to the Trustee to the extent that payment of \$30,000.00 to MAFC on January 12, 2004, is a preferential transfer, subject to the affirmative defense available to MAFC under section 547(c)(2) of the Bankruptcy Code, and shall deny summary judgment to MAFC on Count III of the Complaint.

This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate order consistent with this opinion.

ENTERED at Manchester, New Hampshire.

Date: December 3, 2004

/s/ J. Michael Deasy
J. Michael Deasy
Bankruptcy Judge