

IN THE UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA, FORT MYERS DIVISION

In Re:

ULRICH FELIX ANTON ENGLER

Case No. 9:08-bk-04360-ALP

Debtor.

**TRUSTEE'S RESPONSE IN COMPLIANCE WITH PRELIMINARY
HEARING ORDER ON MOTION FOR RELIEF FROM
STAY FILED BY CONGRO FINANZ AG & PRIMUS GMBH**

COMES NOW the Chapter 7 Trustee, ROBERT E. TARDIF JR., and files this response in compliance with the Court's Order Scheduling Preliminary Hearing on the Motion for Relief from Stay filed by CONGRO FINANZ AG and PRIMUS GMBH and states as follows:

1. The undersigned is the Chapter 7 Bankruptcy Trustee of the above referenced Debtor. CONGRO FINANZ AG (hereinafter CONGRO) and PRIMUS GMBH (PRIMUS) are apparent creditors of the Debtor by virtue of the entry of final judgments against the Debtor.
2. Pre-petition and within the 90-day preference period CONGRO and PRIMUS allegedly properly served approximately 11 writs of garnishment on various individuals and/or entities. Some garnishees served answers while others did not and CONGRO and PRIMUS obtained garnishment judgments by default.
3. CONGRO and PRIMUS have moved for relief to finalize all pending garnishments. As noted in CONGRO and PRIMUS' compliance response, counsel for the movants have already received more than \$1.3 million and the money is deposited in counsel's trust account.
4. The Trustee will be filing an adversary proceeding within the next few days with respect to the writs of garnishment served within the 90-day preference period as the Trustee believes service of the garnishment writs constitute voidable preferences. In the context of an adversary proceeding the Court can determine whether the service of the writs of garnishment constitute preferential transfers pursuant to 11 U.S.C. § 547.
5. Inasmuch as counsel for CONGRO and PRIMUS has possession of various funds already, the movants have adequate protection without being granted relief from the automatic stay before the Court rules on the preference issue in an adversary proceeding.

Legal Argument

6. The position of the movants is exclusive based upon the proposition that the service of a writ of garnishment creates a statutory lien. Therefore, the movants argue that any lien created by the service of the writ cannot be avoided by the Trustee as a preferential transfer. See In re Marineau, WL 1751740 (Bkrcty. S.D. Fla. 2006) and In re Giles, 271 B.R. 903 (Bkrcty. M.D. Fla. 2002).
7. In Giles Judge Williamson did not hold that a garnishment lien is a statutory lien as defined in 11 U.S.C. § 101(53). The Giles case is only significant in the sense that the court determined the point at which the garnishment lien is created. In Continental National Bank of Miami v. Tovormina (In re Masvidal), 10 F.3d 761 (11th Cir. 1993), the court previously held that a lien does not arise upon service of the writ. More importantly, Judge Williamson specifically did not determine whether garnishment lien rights are avoidable under Section 547. Giles at 906 n. 2.
8. In Marineau, Judge Olsen did indicate that service of a writ of garnishment creates a statutory lien that is not avoidable under Sections 545 or 547. Upon review of the Bankruptcy Code and applicable case law, one can only reach the conclusion that the Marineau opinion is an aberration and is incorrect on this issue.
9. The vast majority of cases addressing the issue have historically held that a garnishment lien is a judicial lien as opposed to a statutory lien. See e.g. In re Rettemnier, 113 B.R. 757 (Bkrcty. S.D. Fla. 1990); In re Bensen, 262 B.R. 371 (Bkrcty. N.D. Tex. 2001); In re R.H.R. Mechanical Contractors, Inc., 358 B.R. 202 (Bkrcty. E.D. Pa. 2006); In re Lafoon, 278 B.R. 767 (Bkrcty. E.D. Tenn. 2002); In re Thomas, 215 B.R. 873 (Bkrcty. E.D. Mo. 1997); In re Town & Country Television, Inc., 22 B.R. 421 (Bkrcty. D. N.M. 1982); Buzzell v. Montgomery Ward & Co. (In re Buzzell), 56 B.R. 197 (Bkrcty. D. Md.1986); In re Vasquez, 205 B.R. 136 (Bkrcty. N.D. Ill.1997); In re Page, 171 B.R. 349 (Bkrcty. W.D. Wis.1994).
10. Federal law, and not state law, determines whether a lien is a judicial lien under the Bankruptcy Code. In re Bensen, 262 B.R. 371, 379 (Bkrcty. N.D. Tex. 2001). A judicial lien is defined in the Code as a “lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding.” 11 U.S.C. § 101(36).
11. The service of a writ of garnishment clearly creates a judicial lien by definition because it is obtained by the issuance of legal process from a legal proceeding.

12. In addition to the preferential nature of the writs of garnishment, it appears that some of the writs were not properly served. While the movants argue that service is presumed to be proper, such a presumption is rebuttable. Service of some of the writs of garnishment is defective upon the face of the returns. As an example, service of writs of garnishment on FreeCell Technologies, Hubert Angler and Rosita App was purportedly gained by serving Dan Doe or Dan Brittan at 1217 Cape Coral, Parkway # 121, Cape Coral, Florida. The above address is a UPS Store that has a mailbox facility and valid service cannot be obtained by Dan Doe and/or Dan Brittan.
13. Even if the Court concludes that service of the garnishment writs are unavoidable statutory liens, the Trustee is the owner of any and all claims involving fraudulent transfers of assets of the Debtor.
14. Even if the Court concludes that service of the garnishment writs are unavoidable statutory liens, the Trustee is the owner of any debt and/or property due to the Debtor to the extent that no debt was due to the Debtor upon service of the writs and to the extent that the garnishees hold no property due or belonging to the Debtor on the date of service.

Certificate of Service

I HEREBY CERTIFY that the foregoing has been electronically filed and served Via the CM/ECF system or by regular U.S. Mail on the following on June 12, 2008.

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