

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.

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**TRUSTEE'S RESPONSE IN COMPLIANCE WITH PRELIMINARY  
HEARING ORDER ON MOTION FOR RELIEF FROM  
STAY FILED BY JP MORGAN CHASE BANK**

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 JP MORGAN CHASE BANK and states as follows:

1. The undersigned is the Chapter 7 Bankruptcy Trustee of the above-referenced Debtor. JP MORGAN CHASE BANK is an apparent creditor of the Debtor by virtue of the entry of a final judgment against the Debtor.
2. Pre-petition and within the 90-day preference period JP MORGAN CHASE served a writ of garnishment on SunTrust Bank.
3. JP MORGAN CHASE has moved for relief to complete the pending garnishment.
4. The Trustee will be filing an adversary proceeding within the next few days with respect to the writ of garnishment served within the 90-day preference period as the Trustee believes service of the garnishment writ constitutes voidable preferences. In the context of an adversary proceeding the Court can determine whether the service of the writ of garnishment constitutes preferential transfers pursuant to 11 U.S.C. § 547.

*Legal Argument*

5. The position of the movant is based upon the proposition that the service of a writ of garnishment creates a statutory lien. Therefore, the movant argues 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).
6. 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 (11<sup>th</sup> 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.
7. 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.
  8. 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).
  9. 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).
  10. 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. Since the judicial lien was created within the 90-day preference period, it is clearly voidable by the Trustee.

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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